Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-108

THE INGALS SHIPBUILDING DIVISION
OF LITTON SYSTEMS, INC.,
Petitioner,

versus

AMERICAN ZINC CO., WILBUR ELLIS CO., INC.,
ET AL,
Respondent,

and

JACOB A. FOSTER, ET AL,
Respondent,

and

VERA CRUZ CIA. NAVIERA, S.A., ETC., ET AL
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 10, 1971 and the denial by the said Court of petition for rehearing on June 3, 1971.

CITATION TO OPINIONS BELOW

The Findings of Fact and Conclusions of Law and judgment of the United States District Court for the Southern District of Mississippi, Southern Division, are reproduced in the Appendix. The case is reported at 313 F. Supp. 671. The opinoins of the United States Court of Appeals for the Fifth Circuit are reproduced in the Appendix and are reported at ..... Fed. 2d .....

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 10, 1971. A timely petition for rehearing filed on May 24, 1971, was denied on June 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The jurisdiction of the District Court was invoked under the Admiralty and Maritime jurisdiction of the United States.

QUESTIONS PRESENTED

1. Does the Maritime law require a licensed pilot for hire to possess more expert knowledge than a general awareness of the only known obstruction to navigation in a harbor, where the pilot steers a vessel under his control into collision with that single, fixed object?

2. May a vessel under the control of a licensed, compulsory pilot place sole reliance for navigation of the vessel and the safety of her crew and cargo at nighttime on a privately maintained buoyed light which is darkened and not displaying its published characteristic?

3. May a trial court disregard recognized laws of science and physics relavent to navigation and speed

of an oceangoing cargo vessel in arriving at a judgment which effectively places the vessel's speed at an impossible 100-200 miles per hour?

4. Is it proper for the trial court to substitute its findins of fact where the plaintiffs' own evidence conclusively establishes that a collision could not have occurred as claimed if the vessel was steered in accordance with the orders given?

5. Does a trial court exercise proper discretion in disallowing pre-judgment interest in a collision case where all parties requested a bifurcated trial and where the general average statement was not issued until seven months after rendition of judgment on the liability questions by the trial court?

REGULATIONS INVOLVED

United States Aids to Navigation System — Buoys 33 CFR 62.25-35.

STATEMENT OF CASE

This application of the Ingalls Shipbuilding Division of Litton systems, Inc. for a Writ of Certiorari is to review a judgment of the United States Court of Appeals for the Fifth Circuit which modified as to interest and affirmed in all other respects the judgment of the United States District Court for the Southern District of Mississippi, Southern Division in favor of American Zinc Co., et al and Vera Cruz Cia. Naviera, S.A., etc., et al, Respondants, for damages and against Petitioner, Ingalls, and also dismissing Ingalls' claim against the compulsory pilot of the M/V STELLA MARIS, Respondant Jacob

Foster, and Ingalls' claim against the vessel M/V STELLA MARIS her owners and navigators.

On the night of June 5, 1969, at 11:50 p.m. CST, the Peruvian flag cargo vessel, M/V STELLA MARIS, under the control of Respondant, Jacob Foster, a harbor pilot licensed by the United States Coast Guard, collided with the outboard end of Ingalls No. 1 shipway. This structure, which was completed in 1958, extends westward from shore into the Pascagoula River and is used for launching vessels constructed at the Ingalls Shipyard complex, which extends along the east shore of the river and harbor.

The No. 1 shipway was admitted by the Respondant pilot, Foster, to be the only obstruction to navigation in the harbor with which he had to concern himself in navigating vessels therein.

The outer end of the shipway was normally marked by a fixed red lighted buoy which for unknown reasons was not displaying the characteristic red light on the night of the collision and for several days prior thereto, and had been displaced approximately 100 feet inshore.

It was held by the Trial Court that the Respondant pilot, Foster, was only "generally aware of the shipways",[1] and the court also found that the pilot "normally

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[1] On pre-trial deposition, the respondant pilot Foster was asked, "—have you, during the four and one-half years that you have been a member of the Pilots" Association, have you made any attempt, or made any study of the launching way, to determine how it rests, or, how it sits, or how its position with reference to the channel and to the river and to the bank?

The answer was: "No, sir."

On trial, Foster testified as follows:

Q. Since 1951, are you aware of any changes that have been made in the ways or in the channel?

A. Well, there was discussion in —58 or —59 or thereabouts,

relied solely on this lighted buoy to ascertain his position while navigating vessels into the Pascagoula Harbor during nighttime hours."

The pilot, Foster, had passed the darkened buoy several hours earlier while on an outbound voyage from the harbor with another merchant vessel. He had not noticed the light or its condition or location at that time. The evidence established that the light had been extinguished for at least several days prior to the collision.

As the M/V STELLA MARIS traveled northward in the Pascagoula Harbor on a stated course of 000° true north and at a speed of three knots, Respondant pilot became aware that the light was out, apparently for the first time. The Trial Court found that,

> "After looking for buoy No. 2 for approximately three to five minutes while proceednig on a course of true north and after having traversed approximately half the distance between beacon 46 and buoy No. 2, the pilot observed the buoy when it was ahead of the vessel approximately five to ten degrees off the starboard bow. —"

The distance of 3,000 feet separates beacon No. 46 and

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of extending the ways. I don't know exactly if they have been extended or not.

Q. Well, as a pilot, have you made any attempt to study any files or any records to determine when the ways were extended?

A. No, sir.

Q. That is, since 1951 you have not.

A. Since 1951, sir.

Earlier, Foster testified:

A. As best of my knowledge, Ingalls applied to extend the ways — I forget how many feet on the ways there, they were asking if anybody had any objections to it.

Q. I see. Did you ever determine how far they extended the ways?

A. No, sir.

the No. 2 buoy which was in close proximity to the No. 1 shipway at the time of the collision. This would place the vessel approximately 1,500 feet from buoy No. 2 if sighted at the time as found by the Trial Court.

The next finding of fact was,

> "Within a period of several seconds after Foster sighted the unlighted buoy No. 2 approximately 150 feet to starboard beam of the STELLA MARIS, the vessel violently collided with some object —. At the time of the collision, the pilot through the vessel was in the middle of the channel. —"[2]

Previously, in granting summary judgment dismissing cargo plaintiff's claim against the vessel, the Trial Court held that, "*This buoy was not observed by anyone until at precisely th etime of the collision or shortly thereafter.* Neither the pilot or anyone else had apparently taken note of this, at least had not expressed any alarm or had iven any warning to any of the crew concerning this matter at the time of this collision but still, in any event, all of the testimony is that this unlighted low buoy No. 2 was approximately 75-150 feet to starboard of the ship at the time of the collision. —"

The respondant pilot, Foster, testified on several occasions that there was no wind or tide effecting the vessel's navigation as it traveled northward in the river. The Trial Court made this finding of fact but later concluded that the tide caused the vessel to move from its intended course of true north to point of collision. The

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[2] If Five seconds elapsed between sighting and collision, indicated speed was 300 feet per second or 200 miles per hour for this oceangoing vessel.

expert witness offered by the pilot, vessel and cargo interests, when asked to give the cause of collision under circumstances similar to those experienced by the STELLA MARIS in navigation northward from beacon No. 46 as described by the pilot and vessel's witnesses stated, "There would have to be something caused it. The error would have to be in the compass or quartermaster or some instrument. It just wouldn't do it if you were heading up on a northerly course unless it was something caused it to get over there." The record establishes that the pilot relied upon the quartermaster to steer the boat and did not look at the compass during the trip northward through the Pascagoula Harbor.

As a result of the collision, the M/V STELLA MARIS was holed on her starboard side, causing damage to the zinc concentrate ore and bagged fishmeal cargo in the forward holds.

American Zinc Co., Ralston Purina, and the other cargo plaintiffs-respondants initially filed suit against the M/V STELLA MARIS and her owners, Ingalls, and the Respondant-pilot, Foster. Answers were filed by all parties and the vessel interests moved for summary judgment as to cargo's claims pursuant to the Carriage of Goods by Sea Act, (COGSA) 46 U.S.C. § 1300-1315. Ingalls filed claims for indemnity against the respondant-pilot, Foster, and against the M/V STELLA MARIS and her respondant-owners Vera Cruz Cia. Naviera, S.A., etc.

The Trial Court granted the vessel's motion for summary judgment as to the claims of the cargo plaintiff-respondants, American Zinc Co., et al.

At the request of all parties, the District Court granted

a bifurcated trial. At the time of trial, the general average statement had not been calculated, and in fact, was not issued until October 20, 1970, or more than one month after Petitioner filed its initial brief in the United States Court of Appeals for the Fifth Circuit in this case.

After a trial on the merits as to liability, the District Court found for the cargo plaintiffs, American Zinc Co., et al, and for the M/V STELLA MARIS and Vera Cruz Cia. Naviera and against Ingalls. The court also dismissed Ingalls' claim against the defendant pilot, Respondant Jacob Foster and against the vessel and her owners. The Trial Court awarded interest from date of judgment.

The United States Court of Appeals for the Fifth Circuit reversed as to interest and granted interest from date of collision, and affirmed on all other grounds.

REASONS FOR GRANTING THE WRIT

The judgment of the Fifth Circuit which affirmed the Trial Court's decision in relieving the respondant pilot, Jacob Foster, of any responsibility for this collision and ensuing damages, was in direct conflict with the rule of law previously established by this Court as to the duties and degree of skill and care required of a licensed pilot for hire who controls the navigation of vessels in commerce in navigable waters of the United States. The decision also creates inter-circuit conflict between the decisions of the Fifth Circuit and the law as expressed by the Ninth Circuit, the Third Circuit, and the Fourth Circuit, as well as an intra-circuit conflict between the decisions of the Fifth Circuit.

The Trial Court, in its review of the evidence, found

that, "He (the pilot) was generally aware of the shipways including Ingalls Shipway or Launchway No. 1 which was marked by Buoy No. 2." It was admtited by the pilot that this shipway was the only obstruction to navigation in the Pascagoula Harbor.

In addition to being in direct conflict with the Pilot's repeated admissions of a lack of knowledge of the shipways and their bearing upon navigation, (see Footnote no. 1, Supra), the requirement of only a general awareness by the pilot of the one obstruction to navigation in his licensed area by the lower Court was in conflict with the accepted rule of law as early expressed by this Court in the case of *Samuel Atlee vs. The Northwestern Union Packing Co.*, 88 US (21 Wall) 389, 22 L. Ed. 619 (1875) . . . That case precisely defines the legal requirements of a pilot which is exact detailed and expert knowledge of the topography through which he steers his vessel and the relation of all internal and external and sunken objects in his path, all of which he must know and remember and avoid.

Subsequently, in the case of *Davidson Steamship Company vs. United States*, 205 US 187, 27 S. Ct. 480, 51 L. Ed. 764 (1907), this Court reiterated this legal duty of a pilot to possess more than "general awareness" of the factors effecting the safety of the vessels, their cargos and personnel with which the pilot is entrusted. The Court held that the pilot had the legal obligation to obtain information as to conditions of the harbor from all available sources.

The present decision by the Fifth Circuit is in conflict with the law of the Second Circuit as set forth in the case of *Chesapeake Bay Bridge & Tunnel District vs.*

Lauritzen, 404 F. 2d 1001 (4th Cir., 1968) which held that the pilot was negligent in ignoring a known menace and making a mistake in his estimtae of distance in his navigation of the vessel. The Third Circuit, in the case of *Utility Service Corp. vs. Hillman Transportation Co.*, 244 F. 2d 121 (3rd Cir., 1957) found the pilot negligent and held that the law imposes a duty upon a pilot to be constantly informed of changes made by the hand of man or the action of the elements in the path of his vessel. Similarly, the Ninth Circuit in the case of *United States vs. Soriano*, 366 F. 2d 699 (9th Cir., 1966), reiterated the law expressed by this Court in finding a pilot negligent in failing to make a proper check of the vessel's position in allowing a current to adversely effect the navigation of his vessel.

In *Ralli vs. Troop*, 157 US 386, 402, 15 S. Ct. 657, 39 L. Ed. 742 (1894), this Court again held that primary responsibility for the direction and navigation of a vessel is attributable to the pilot and that there is a presumption that errors resulting in grounding are chargeable to the pilot.

A review of other decisions of the Fifth Circuit shows that the instant decision creates an intra-circuit conflict as well. In *Humble Oil & Refining Company v. Tug Crochet*, 422 F. 2d 602 (5th Cir., 1970), involving collision between a tug-pushed barge and the wreck of a sunken barge, the Fifth Circuit found fault on the part of the tug's navigators in an almost identical case as that now before the Court. As is the case with the Ingalls No. 1 shipway, the Court found that the wreck was a well-known hazard to navigation and that its presence was analogous to piers, bridges, rock shoals or similar known

fixed objects. The Court, in its footnote, cited 33 CFR 62.25.55 which embodies the appropriate legal cautions relating to sole reliance on floating buoys for navigational purposes.[3]

In this case, the Respondant pilot, Foster, admitted that he placed sole reliance for the vessel's navigation and safety on the darkened buoy and the Court below made this is as a finding of fact.[4] However, both the pilot and

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[3] "§ 62.25.55 Caution — (a) Buoys are liable to be carried away, shifted, capsized, sunk, etc.; lighted buoys may be extinguished or sound buoys may not function as a result of storm, the accumulation of ice, running ice, or other natural causes, collision or other accident. (b) For the foregoing reasons mariners should not rely completely upon the position or operations of floating aids to navigation, but should also utilize bearings from fixed objects and aids to navigation on shore."

[4] (Finding of Fact No. 15, Appendix) The Pilot Foster was an experienced Pascagoula Bar pilot since 1965 and prior to that time was master and pilot of tugboats operating in the Gulf of Mexico. He possessed a U.S. Coast Guard Master's unlimited license for lakes, bays and sounds, and was a qualified first class pilot for Pascagoula, Mobile and the intercoastal waterway between those two ports. During his ten years as a Pascagoula port pilot, Mr. Foster had piloted approximately twelve hundred vessels in and out of the port on an average of approximately 300 vessels per year. He was generally aware of the shipways including Ingals Shipway or Launchway No. 1 which was marked by Buoy No. 2. He normally relied solely on this lighted buoy to ascertain his position while navigating vessels into the Pascagoula Harbor during nighttime hours. He and other Pascagoula Bar pilots testified that the light on buoy No. 2 had been inoperational on several occasions prior to June 5, 1969, but that they had never known it to be out of position before that time. He had checked "Stella Maris" compass on the Horn Island Pass range whil epassing over the bar and found it to be accurate. On previous occasions Foster had inspected the area around Buoy No. 2 and the end of shipway No. 1 and had determined that in May, 1969, a month before this collision, buoy No. 2 was located at 15-20 feet west of the west end of way No. 1 and that there was 35 feet of water up to the buoy. The river channel was approximately 38 feet deep at high tide at the place where the collision occurred, and at the time of th collision, the tide was high, just beginning to fall, with the current moving in a southeasterly direction. The channel of the river was designated to be 350 feet wide but it is actually 370 feet wide in the area of shipway No. 1. At 8:45 p.m. on the night of this collision, June 5, 1969, Foster had piloted the Victory Class Vessel, S/S Silver Hawk from Terminal "A" wharf in the Pascagoula, Mississippi harbor to Horn Island Pass down the same channel up which the Stella Maris was later traveling at the time of the collision. The Silver Hawk was approximately 490 feet long with a beam of 65-70 feet and an eight foot draft. Also on May 20, 1969 he traversed this channel while piloting a ship out to the Gulf from Terminal wharf "A" at approximately 4:30 a.m. On neither occasion did he attempt to ascertain the position or condition of buoy No. 2.

the Court below completely overlooked this specific federal regulation which cautions against such reliance. This warning is another factor which a prudent pilot would take into consideration in his navigation of a vessel. Footnote 3, supra.

In *Humble Oil & Refining Company vs. supra*, the court, applied this regulatory caution in finding negligence on the part of the navigators of a tug which collided with a known sunken object. Failure to make the same application in this case of almost identical circumstances presents a clear intra-circuit conflict and makes further inroads into the established law pertaining to the duty of care required of pilots for hire on navagable waters of the United States.

On other occasions the Fifth Circuit has imposed liability on a pilot under similar circumstances. *Bethlehem Steel Corp. vs. Yates*, 438 F. 2d 798 (5th Cir., 1971); *Tampa Ship Repair & Drydock Co., Inc. vs. A. T. St. Philip, Inc. vs. Harry J. Williams*, 440 F. 2d 1193 (5th Cir., 1971).

There are a multitude of district court cases which follow the rule expressed by this Court which would impose liability upon pilot Foster under the circumstances of this case. *Petition of Canal Barge Company*, 323 F. Supp. 805 (USDC N. D. Miss., Greenville Div., 1971); *Park Steamship Co. vs. City Service Oil Company*, 93 F. Supp. 201 (S.D. N.Y., 1950), reversed in part at 188 F. 2d 804; *Essex County Electric Company vs. M/S Godafoss*, 1955 AMC 755 (D.C. Mass. 1955, ADM No. 54-22-A); *Standard Dredging Corp. vs. S/S SYRA vs. USA vs. J.L. Davis, Pilot vs. Standard Dredging*

Corp., 290 F. Supp. 260, 1968 AMC 2235 (D.C. Md. 1968).

It is respectfully submitted that the instant decision by the Fifth Circuit constitutes serious errosion of the principle of law established by this Court and generally recognized and applied throughout our judicial system. The purpose of imposition of such a stringent burden upon the licensed pilot for hire is, of course, a compelling one. Each hour of the day pilots in the position of the Respondant, Foster, are entrusted with the safety of countless millions of dollars worth of cargo and the lives of passengers and crews of merchant vessels. Any relaxation of these legal requirements can only be at the expense of the commercial interests of the United States and the public as a whole.

The judgment of the Court below which exonerated a pilot who admittedly did not measure up to the requirements imposed upon him by law is contrary to the law of the United States as expressed by this Court, other circuits, as well as decisions in similar cases by the Fifth Circuit.

In this case the pilot directed the course of the M/V Stella Maris into the only obstruction in the Pascagoula harbor.

Petitioner urges that this Court isseu a Writ of Certiorari to the Fifth Circuit to clear up this inter-circuit and intra-circuit conflict and to clearly define the present law applicable to the standard of care of licensed pilots on navigable waters of the United States.

Further cogent reasons for granting a Writ of Cert-

iorari in this Admiralty case are immediately obivous when the record is closely scrutinized and analyzed from a standpoint of physical possibility and common sense relative to movement of the conventional designed ocean-going vessel in this small harbor.

The vessel's and pilot's actions in a 3,000 foot stretch of the Pascagoula Harbor, between beacon No. 46 and the No. 2 Ingalls buoy, prior to collision, are the focal point for review.

It is established that the M/V STELLA MARIS at all pertinent times traveled at a speed of three knots and on an alleged course of 000° true north. Mathematically, three knots is a speed of 304 feet per minute so that the elapsed time of ten minutes is indicated for the 3,000 foot journey.

However, in one instance, the Court below found that the vessel was one-half the distance between the Ingalls No. 2 buoy and beacon No. 46 when the darkened buoy was allegedly first sighted. Thus, a distance of 1,500 feet remained between the vessel and the No. 2 buoy and the point of collision.[5]

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[5] (Finding of Fact No. 11) After looking for Buoy No. 2 for approximately three to five minutes while proceeding on a course of the north and after having traversed approximately half the distance between Beacon No. 46 and Buoy No. 2, the pilot observed the Buoy when it was ahead of the vessel and approximately five to ten degrees off the starboard bow. At no time had the pilot or captain looked at the compass since coming to the course of true north, although the quartermaster was navigating and it was his duty to observe the compass. Buoy No. 2 was approximately 150 feet to the starboard side of the vessel at the time the "Stella Maris" passed it abeam. The forward lookout did not observe Buoy No. 2 until the forecastle of the vessel was approximately past it. The captain did not express any concern over the fact that the buoy could not be located, did not question either the lookout or pilot about this situation and gave no orders concerning navigation of the vessel bewteen Beacon No. 46 and Buoy No. 2. No attempts were made by either the pilot or captain to stop the vessel, reverse the engines or anchor the vessel during the

The next finding of fact, No. 12, holds that the collision occurred within a "period of several seconds after the pilot, Foster, sighted this buoy.[6]

If the several seconds referred to in finding of fact No. 12 is as many as five seconds, a speed of 300 feet per second or approximately 200 miles per hour is the result for this oceangoing cargo vessel which is powered by a single deisel engine. This is, of course, impossible.

Other evidence in the record is to the effect that neither the pilot nor the lookout or captain saw the darkened buoy until the vessel was almost on top of it, some 10-200 feet away.[7]

Also, the Court below found as a fact that there was no wind or tide to move the vessel from its intended course of 000° true north.[8]

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time elapsing between passing Beacon No. 46 and the sighting of Buoy No. 2 before the collision. There was no other traffic in the river at the time the "Stella Maris" traveled northward from Beacon No. 46.

[6] (Finding of Fact No. 12) Within a period of several seconds after Foster sighted the unlighted Buoy No. 2 approximately 150 feet to the starboard beam of the "Stella Maris" the vessel violently collided with some object and the captain asked the pilot if the ship had hit Buoy No. 2 to which the pilot answered in the negative, pointing it out to the captain off the starboard beam. At the time of the collision, the pilot thought the vessel was in the middle of the channel. —"

[7] "This buoy was not observed by anyone until at precisely the time of the collision or shortly thereafter. Neither the pilot or anyone else had apparently taken note of this, at least had not expressed any alarm or had given any warning to any of the crew concerning that matter at the time of this collision but still, in any even, all of the testimony is that this unlighted, low buoy No. 2 was approximately 75-150 feet to the starboard of the ship at the time of the collision. —" (Tr. p. 408, motion for summary judgment by cargo respondants)

[8] (Finding of Fact No. 9, Appendix) The Stella Maris at the direction of its pilot, Foster, passed beacon No. 46 at a distance between 125 and 150 feet to her port side. This beacon is shown on Chart 414 and described on the Coast Guard Light List as a flashing red four-second light. At this point the Pascagoula Channel is 350 feet wide and although it is shown on navigation charts to be located 150 feet outside the channel limit on the east side thereof at its second bend, it is in actuality only approximately 25 feet east of te channel which has 38

If a course of 000° true north had been followed by the vessel, the collision could not have occurred. Respondants expert witness recognized this fact and also defined the cause of the collision as compass or quartermaster or instrument error. However, the Trial Court subsequently concluded that a falling tide caused a change in course.

The Trial Court did not have any evidence upon which it could reach the conclusions which it did or make the findings of fact which he did in this case.

As the judgment now stands, it is contrary to all of the evidence in the record, and presents an impossible factual situation from a navigation standpoint. These facts are further examples of the error and neglect and lack of skill on the part of respondant pilot, Foster, who was charged with the safety of navigation of the M/V STELLA MARIS. It is submitted that this is an Admiralty case which warrants review by this Court on Certiorari to reaffirm the principles of law established at an early date by this Court relative to the duties and responsibilities of a pilot of commercial vessels, and to further correct patent and manifest error of the Court below.

The Court below rendered judgment against petitioner and in favor of the vessel and cargo plaintiffs-respondants for "their losses and damages sustained by them

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feet of water at that point. As the vessel passed beacon No. 46 the pilot ordered the helmsman to change course to 000° degrees, or true north, and to reduce speed to "dead slow ahead", or 2½ or 3 knots, which order was carried out. At this time, and at all times on the night in question, including the time of the hereinafter mentioned collision, here was no apparent tide or wind condition present which affected the navigation of the vessel as she proceeded northward. The night was dark but the weather clear and visibility unimpaired.

as a result of the collision of the M/V STELLA MARIS with Ingalls No. 1 way on June 5, 1969, plus interest at six percent per annum from the date heerof and Ingalls must reimburse them for any contributions they may be called upon to make in General Average and/or salvage, plus interest at six percent per annum from the date thereof, together with costs, and that if within thirty (30) days after the adjustment of General Average has been completed the parties have not stipulated the compensation of damages, plaintiffs and Vera Cruz Cia. Naviera, S.A. may apply to the Court to set a date for trial on the question of damages.

The Fifth Circuit, however, reversed as to question of pre-judgment interest holding that with the claims of the cargo interests "are readily ascertainable."

In this case, all of the parties requested a bifurcated trial so that liability could be tried first. The judgment of the District Court clearly shows that damages were not so readily ascertainable as the Fifth Circuit found. In fact, the General Average statement which forms an integral part of the calculation of damages in this Admiralty collision case was not issued until October 20, 1970, or some six months after rendition of judgment by the Trial Court. Apparently, the Court below failed to distinguish this Admiralty case from a typical land collision case where damages arising from vehicular collision are easily ascertainable by simply taking an automobile to the nearest garage. The Court below had ample evidence and reasons for disallowing prejudgment interest which is a matter of the Trial Court's discretion. There was simply no basis for the Fifth Circuit's reversal of the Trial Court's discretionary decision on.

pre-judgment interest. Both the Third Circuit, and the Second Circuit, as well as numerous district courts throughout the country recognize the discretionary power of the Trial Court in a case such as this and absent a showing of an abuse of the discretion, which is not the fact here, the Trial Court's decision is not disturbed. In this case, there has been no trial on damages as of the date of this petition for Writ of Certiorari. The Second Circuit in *Afran Transport Co. vs. The Bergechief*, 285 F. 2d 119 (2nd Cir., 1960), recognized this principle and held that an award of interest in Admiralty may await the court's judgment which fixes the amount due. The Third Circuit, in *Gardner vs. The Calvert*, 253 F. 2d 395, Cert. denied 356 US 960 reached the same results. The Fifth Circuit itself, in the *Mary B. Curtis*, 250 F. 9 (5th Cir., 1918) and in *Chitty vs M/V VALLEY VOYAGEUR*, 408 F. 2d 1354 (5th Cir,, 1969), and in numerous other cases has recognized the Trial Court's discretionary power in granting or not granting pre-judgment interest.

In this case, there has been no trial on damages as of this date. General average was not calculated until after an appeal was pending in the Fifth Circuit on the liability question. There was no reasonable basis for the Fifth Circuit's reversing the Trial Court's discretionary decision in disallowing pre-judgment interest. Such action is clearly contrary to the circumstances of the case and is in conflict with the rule as promolgated by other Circuit Courts.

It is therefore respectfully submitted that the Trial Court's disallowing pré-judgment interest in this case was proper and in accordance with the established law

and that the Writ of Certiorari should issue to allow this court to clearly define law relating to granting of interest in Admiralty collision cases.

CONCLUSION

Petitioner, The Ingalls Shipbuilding Division of Litton Systems, Inc., urges this Court to issue a Writ of Certiorari to the Fifth Circuit in order to clearly define the law as to the duty and knowledge of a licensed harbor pilot, to clear up the disparity between the Circuits on this important point of law, to correct a clearly erroneous and impossible decision, and to define the law relative to allowance of pre-judgment interest in collision cases.

Respectfully-submitted,

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New Orleans, Louisiana 70112
Attorney for Petitioner
The Ingalls Shipbuilding Division
of Litton Systems, Inc.

CERTIFICATE

I certify that a copy of the foregong petition for certiorari and accompanying brief has been served on opposing counsel by depositing same in the U. S. Mail, postage prepaid, this ..... day of July, 1971.

FRANK C. ALLEN, JR.

APPENDICES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 3758

AMERICAN ZINC CO., WILBUR ELLIS CO., INC. RALSTON PURINA CORPORATION, CARGILL INCORPORATED, AND INTERNATIONAL PROTEIN CORPORATION, EAGLE STAR INSURANCE CO., LTD., COMMERCIAL INSURANCE COMPANY OF NEWARK HARTFORD INSURANCE COMPANY, AND ORION INSURANCE COMPANY

Plaintiffs

versus

JACOB A. FOSTER, a pilot, and THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC., A MARYLAND CORPORATION

Defendants

versus

THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC., A MARYLAND CORPORATION

Third Party Plaintiff

versus

VERA CRUZ CIA. NAVIERA, S.A. Owners of the M/V STELLA MARIS, *in Personam*, and THE M/V STELLA MARIS, her engine, boilers, etc., *in Rem*, and JACOB A. FOSTER, her Pilot.

Third Party Defendants

JUDGMENT

The above entitled action having come on regularly for trial and at the conclusion of the evidence the Court having reserved decision, and the Court, after duly considering all of the evidence, exhibits and arguments of counsel, having, on March 20, 1970, filed its findings of fact and conclusions of law; it is now

ORDERED, ADJUDGED and DECREED that Plaintiffs and Third-Party Defendant and counter-claimant Vera Cruz Cia. Naviera, S.A. recover of and from Defendant Ingalls Shipbuilding Division of Litton Systems, Inc. their losses and damages, sustained by them as a result of the collision of the M/V STELLA MARIS with Ingalls' No. 1 way on June 5, 1969, plus interest at six percent per annum from the date hereof and Ingalls must reimburse them for any contributions they may be called upon to make in General Average and/or salvage plus interest at six percent per annum from the date hereof, together with costs, and that if within thirty (30) days after the adjustment of General Average has been completed the parties have not stipulated the computation of damages, Plaintiffs and Vera Cruz Cia. Naviera, S.A. may apply to the Court to set a date for trial on the question of damages; and it is further

ORDERED, ADJUDGED and DECREED that the Third-Party complaint of Ingalls Shipbuilding Division of Litton Systems, Inc. be and the same hereby is dismissed as against Vera Cruz Cia. Naviera, S.A. and the

M/V STELLA MARIS, at Ingalls' costs..

ORDERED AND ADJUDGED this the 13th day of April, 1970.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Albert S. Johnston, III., Esq. and Haight,
Gardner, Poor & Havens
Attorneys for Vera Cruz Cia. Naviera, S.A.

Palmer & Palmer and Jones, Walker,
Waechter, Poitevent, Carrere & Denegre
Attorneys for Ingalls Shipbuilding
Division of Litton Systems, Inc.

Lester C. Franklin, Jr. and John Gautier
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 3758

AMERICAN ZINC CO., WILBUR ELLIS CO., INC. RALSTON PURINA CORPORATION, CARGILL INCORPORATED, AND INTERNATIONAL PROTEIN CORPORATION, EAGLE STAR INSURANCE CO., LTD., COMMERCIAL INSURANCE COMPANY OF NEWARK HARTFORD INSURANCE COMPANY, AND ORION INSURANCE COMPANY

Plaintiffs

versus

JACOB A. FOSTER, a pilot, and THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC., A MARYLAND CORPORATION

Defendants

versus

THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC., A MARYLAND CORPORATION

Third Party Plaintiff

versus

VERA CRUZ CIA. NAVIERA, S.A. Owners of the M/V STELLA MARIS, *in Personam*, and THE M/V STELLA MARIS, her engine, boilers, etc., *in Rem*, and JACOB A. FOSTER, her Pilot.

Third Party Defendants

JUDGMENT

This action coming on for trial before the United States District Court for the Southern District of Mississippi, Southern Division, Honorable Walter L. Nixon, Jr., District Judge presiding, and the issue having been duly tried and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs herein, and also the third party plaintiff, take nothing from the defendant, Jacob A. Foster, that the action of the plaintiffs, and also, the action of the third party plaintiff, be dismissed on the merits against the defendant, Jacob A. Foster, and that the defendant, Jacob A. Foster, recover of the plaintiffs, American Zinc Co., Wilbur Ellis Co., Inc., Ralston Purina Corporation, Cargill Incorporated, and International Protein Corporation, Eagle Star Insurance Co., Ltd., Commercial Insurance Company of Newark, Hartford Insurance Company, and Orion Insurance Company, and the third party plaintiff, The Ingalls Shipbuilding Division of Litton Systems, Inc., a Maryland Corporation, his costs of action.

DATED at Biloxi, Mississippi, this the 25th day of March, A.D., 1970.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 3758

AMERICAN ZINC CO., WILBUR ELLIS CO., INC. RALSTON PURINA CORPORATION, CARGILL INCORPORATED, AND INTERNATIONAL PROTEIN CORPORATION, EAGLE STAR INSURANCE CO., LTD., COMMERCIAL INSURANCE COMPANY OF NEWARK HARTFORD INSURANCE COMPANY, AND ORION INSURANCE COMPANY

Plaintiffs

versus

JACOB A. FOSTER, a pilot, and THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC., A MARYLAND CORPORATION

Defendants

versus

THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC., A MARYLAND CORPORATION

Third Party Plaintiff

versus

VERA CRUZ CIA. NAVIERA, S.A. Owners of the M/V STELLA MARIS, *in Personam*, and THE M/V STELLA MARIS, her engine, boilers, etc., *in Rem*, and JACOB A. FOSTER, her Pilot.

Third Party Defendants

This is a suit in admiralty filed by plaintiffs, owners of certain shipments of cargo consisting of zinc concentrates, fishmeal and wholemeal, which was loaded and stowed in Peru aboard the Peruvian ship, S/S Stella Maris, and which was being transported thereon to Pascagoula, Mississippi. Plaintiffs contend that their cargo was partly damaged and partly subjected to "Stella Maris'" claim in General Average when the "Stella Maris" struck a submerged object and ultimately sank while traveling up the Pascagoula River or the night of June 5, 1969. This suit was filed by plaintiffs against the defendants, Vera Cruz CIA. Naviera, S.A. (hereinafter referred to as "Vera Cruz"), owners of the S/S Stella Maris, the "Stella Maris" and its agent, Ferrarbos Hermanos Callao, S.A. Plaintiffs subsequently amended their complaint to bring in as defendants Ingalls Shipbuilding Division of Litton Systems, Inc. (hereinafter referred to as "Ingalls") and Jacob A. Foster, a bar pilot on board the vessel "Stella Maris" at the time of the collision (hereinafter referred to as "Foster").

Subsequent to the commencement of this suit, Summary Judgment was granted in favor of the vessel "Stella Maris", its agent and owners because the affidavits and sworn testimony considered on the Summary Judgment bearing convinced this Court that there was no question fact concerning the seaworthiness of the "Stella Maris", but as a matter of law, she was seaworthy. Thus, plaintiffs were not, as a matter of law, entitled to recover against those defendants under the carriage of Goods By Sea Act, 46 U.S.C.A. 1304.

Also, during the time the Motion for Summary Judgment was under consideration, the defendant, Ingalls,

filed a Third-Party action against the "Stella Maris", its agent and owners, and Jacob A. Foster, the pilot. Thereafter, Vera Cruz and the agent for the vessel "Stella Maris" filed a counterclaim against Ingalls. At the trial of this matter C. Tennant Sons, & Co. of New York (hereinafter referred to as "Tennant") and the insurers of the subject cargo were added as parties plaintiff with permission of the Court.

All parties to this action jointly moved the Court for a severance of this trial on the issues of liability and damages and pursuant to admiralty practice under 28 U.S.C. §1292(a)(3) and Rule 53, Federal Rules of Civil Procedure. The Court granted this motion and has tried and will now decide the issue of liability or responsibility only, having reserved the question of damages for further trial in the event the parties cannot stipulate thereto after they have been fully computed and an adjustment of General Average has been completed.

The Court, having heard all the evidence in this case, considered all exhibits, heard arguments of counsel, and carefully read and considered post-trial briefs as well as proposed findings of facts and conclusions of law submitted by all the parties, now makes the following Findings of Fact and arrives at the following Conclusions of Law:

FINDINGS OF FACT

1. All plaintiffs, other than those who are underwriters, were the owners of the cargo loaded and stowed aboard the "Stella Maris" at the time of the collision in question, including the cargo that was damaged. The

Underwriter or Insurer plaintiffs, having reimbursed the titled plaintiffs, their assureds, for the particular losses suffered as a result of the subject casualty were and are subrogated to the latter's rights. The Owner plaintiffs also have standing to complain by virtue of the fact that they have a right of recovery surviving subrogation as to any contribution they may be obligated to make in the General Average declared by the vessel.

2. At the time the cargo was loaded to the "Stella Maris" at the ports of loading in Peru and at the time of the collision in question on June 5, 1969, it was in good order and condition. As a direct result of this collision, the cargo owned by plaintiffs was partially damaged by Pascagoula River water which entered the "Stella Maris" through the tear in her hull caused by striking a submerged object.

3. After being loaded in May, the "Stella Maris" sailed from Paita, Peru, its last port of loading and thereafter arrived off Pascagoula, Mississippi, anchoring at the sea buoy off Petit Bois Island on June 4, 1969. On the following night of June 5, 1969 at approximately 2205 hours "Stella Maris" took aboard the compulsory Pascagoula River pilot and Third Party defendant, Jacob A. Foster, at the sea buoy located south of Horn Island Pass, for the purpose of proceeding north up the Pascagoula River to Terminal "A" wharf located on the Westbank of the Pascagoula River in the Pascagoula harbor to unload her cargo. The vessel weighed anchor and got underway at 2229 hours at full speed ahead. During the voyage up the Pascagoula Channel and intol the Pascagoula harbor the "Stella Maris'" first officer, Juan

Mejia, who had 22 years of experience at sea and who had sailed into the Pascagoula harbor on four or five previous occasions, was stationed on the forecastle as lookout. Prior to weighing anchor, and after the pilot Foster came aboard, Mr. Mejia consulted and studied Chart No. 414 which is the navigation chart of the Pascagoula Channel and harbor (Ex. I-4) kept aboard the "Stella Maris" as a navigational aid. The vessel was also equipped with a United States Coast Guard Light List, 1969 Volume (Ex. I-3), showing navigational aids in the Pascagoula River, which was consulted by the vessel's captain Alphonso Oliva Arana, prior to entering the Pascagoula River.

4. Mr. Mejia, the only forward lookout on duty during the voyage from the sea buoy into the Pascagoula harbor, had the duty of keeping a lookout forward for any dangerous or unusual conditions, and for any item that obstructed the vessel's way, and reporting these to the bridge. He received no special instructions from either the captain of the "Stella Maris" or pilot Foster concerning these duties on the night of June 5, 1969, but knew these to be his normal duties as First Officer and lookout. He was stationed on the forecastle, a location approximately 160 feet forward of the bridge. The vessel was equipped with a loudspeaker communication system between the forward lookout's post and the bridge which was in operating condition on the evening of June 5, 1969 as the vessel entered the Pascagoula River.

5. An anchor watch consisting of the quartermaster, Gosi Collaso, and two other seamen were stationed on the forecastle to drop anchor in the event that it became necessary. Three or four seconds was required to let the

anchor go. The "Stella Maris" was equipped with two forward anchors which were in position to be dropped when and if the order was received.

6. The captain of the "Stella Maris", Alphonso Oliva Arana, who had been a ship's master for 15 years although this was his first voyage as captain of the "Stella Maris", was stationed on the bridge of the vessel during the period of time from weighing anchor at the sea buoy until its arrival at Terminal "A" wharf at 0010 hours on June 6, 1969. Also stationed on the bridge of the vessel were her third officer, the helmsman, and pilot Foster. The helmsman of the "Stella Maris" was Juan Garcia Chaves, who had served aboard the vessel for a period of two years and four months and had served as helmsman thereon when it entered the Pascagoula River on six previous occasions.

7. The "Stella Maris" was equipped with a fathometer which was in proper operating condition, radar which had a minimum range of one-half mile and maximum range exceeding ten miles, and a marine radio equipment, none of which was inquired about by Foster on the night in question and none of which was utilized by anyone aboard the vessel either prior to or subsequent to the collision which occurred.

8. The "Stella Maris" had an overall length of approximately 400 feet and a 50 foot beam. She drew 24 feet of water and eye level on her bridge was 42 feet above the water level.

9. The "Stella Maris", at the direction of its pilot, Foster, passed Beacon No. 46 at a distance between 125

and 150 feet to her port side. This beacon is shown on Chart 414 and described on the Coast Guard Light List as a flashing red four-second light. At this point the Pascagoula Channel is 350 feet wide and although it is shown on navigation charts to be located 150 feet outside the Channel limit on the east side thereof at its second bend, it is in actuality only approximately 25 feet east of the Channel which has 38 feet of water at that point. As the vessel passed Beacon No. 46 the pilot ordered the helmsman to change course to 000° degrees, or true north, and to reduce speed to "dead slow ahead", or 2 1/2 or 3 nots, which order was carried out. At this time, and at all times on the night in question, including the time of the hereinafter mentioned collision, there was no apparent tide or wind condition present which affected the navigation of the vessel as she proceeded northward. The night was dark but the weather clear and visibility unimpaired.

10. After rounding Beacon No. 46, the pilot Foster attempted to locate the next navigational aid, Buoy R-2 (hereinafter referred to as Buoy 2), privately maintained by the defendant and third party plaintiff Ingalls, which normally displays a red light and has a visibility of at least two miles under the then prevailing weather conditions. Buoy 2 is located approximately 2950 feet north of Beacon No. 46 on the east half of the river and is listed as a private aid to mark the outer submerged end of Ingalls Shipway (launching way) No. One (1) in the U.S. Coast Guard Light List, Vol. 2, Atlantic and Gulf Coast, 1969 Edition. Neither the pilot, the captain, nor the forward lookout was able to see Buoy No. 2 at that time because the light thereon was not burning, and as a matter of fact, it was discovered

on June 6, 1969 to have been moved therefrom. Buoy No. 2 is conical shaped, approximately 48 inches in diameter at its topmost point, and was anchored with a 300 pound two-foot square 6-inch thick concrete block on a chain. Neither the pilot Foster nor the captain gave any order for a change of course or speed and the vessel continued ahead from Beacon No. 46. There was no discussion between the pilot, captain or lookout concerning the fact that the Buoy could not be seen after the vessel passed Beacon No. 46 and before the collision, although Foster stated that he became concerned when he could not locate the lighted Buoy No. 2. The pilot knew that this buoy was listed as privately maintained and knew the purpose thereof. He further testified that he made no distinction between privately maintained aids and Coast Guard maintained aids for navigational purposes, despite the fact that he admitted being familiar with the Coast Guard Light List (Ex. I-3) and the Merchant Marine Officer's Handbook (Ex. I-7) and the Merchant Marine Seaman's Manual (Ex. I-8), all of which state in effect that a prudent pilot should not place complete reliance on privately maintained buoys, and also, that all buoys should be used as guides and not infallible navigational aids.

11. After looking for Buoy No. 2 for approximately three to five minutes while proceeding on a course of true north and after having traversed approximately half the distance between Beacon No. 46 and Buoy No. 2, the pilot observed the Buoy when it was ahead of the vessel and approximately five to ten degrees off the starboard bow. At no time had the pilot or captain looked at the compass since coming to the course of true north, although the quartermaster was navigating and it was

his duty to observe the compass. Buoy No. 2 was approximately 150 feet to the starboard side of the vessel at the time the "Stella Maris" passed it abeam. The forward lookout did not observe Buoy No. 2 until the forecastle of the vessel was approximately past it. The captain did not express any concern over the fact that the buoy could not be located, did not question either the lookout or pilot about this situation and gave no orders concerning navigation of the vessel between Beacon No. 46 and Buoy No. 2. No attempts were made by either the pilot or captain to stop the vessel, reverse the engines or anchor the vessel during the time elapsing between passing Beacon No. 46 and the sighting of Buoy No. 2 before the collision. There was no other traffic in the River at the time the "Stella Maris" traveled northward from Beacon No. 46.

12. Within a period of several seconds after Foster sighted the unlighted Buoy No. 2 approximately 150 feet to the starboard beam of the "Stella Maris", the vessel violently collided with some object and the captain asked the pilot if the ship had hit Buoy No. 2 to which the pilot answered in the negative, pointing it out to the captain off the starboard beam. At the time of the collision the pilot thought the vessel was in the middle of the Channel. The collision occurred at 2350 hours (11:50 P.M.) on June 5, 1969 and caused the vessel to sheer to port. At this time the pilot's order to bring the ship back on its proper course was executed, and it proceeded north to Terminal wharf "A". A few minutes after the collision the mate informed the captain that the ship was taking water in the Number 1 and Number 2 cargo holds. "Stella Maris" arrived at Terminal "A" wharf approximately 15 to 20 minutes subsequent

to the collision, at which time the crew dropped the starboard anchor and secured the lines to the wharf. The "Stella Maris" is equipped with standard marine radio equipment and the pilot Foster carried a walkie-talkie unit on a special frequency for pilots and F.B. Walker tugboats, but no attempt was made by either the pilot or the captain to summon any type assistance during the time between the collision and the time the vessel docked and her agent was telephoned by the pilot and informed of the collision. The captain had remained on the bridge of the ship from the time of the collision until it docked ten minutes past midnight.

13. Further inspection of the Numbers 1 and 2 cargo holds was made after docking, and it was determined that water was continuing to rise therein. In view of the fact that the vessel's pumps were not controlling the flooding and the water continued to rise in the two holds between decks, at 47 minutes after midnight the "Stella Maris" engines were started and she was beached in the Pascagoula turning basin located approximately 400 yards north of Terminal "A" at approximately 1:00 A.M. on June 6, 1969. She was beached in soft mud where she continued to sink by the bow until the Numbers 1 and 2 cargo holds were entirely flooded and water covered the main deck above those holds, damaging or destroying all cargo stored therein.

14. In addition to the above mentioned navigational aids and equipment, the "Stella Maris" also had aboard two pelorus instruments used for taking bearings, which were stored in the chart room immediately available for use within a matter of seconds, but no attempt was made by either the pilot or the captain to utilize these instru-

ments to take bearings as the vessel traveled from Beacon No. 46 toward Buoy No. 2. There were numerous fixed lights on the east and west banks of the Pascagoula River in the near vicinity of the area of the collision but none of these would have benefited the pilot in navigating the vessel between Beacon No. 46 and Buoy No. 2 on the night in question.

15. The pilot Foster was an experienced Pascagoula bar pilot since 1965 and prior to that time was master and pilot of tugboats operating in the Gulf of Mexico. He possessed a U.S. Coast Guard Master's unlimited license for lakes, bays and sounds, and was a qualified first class pilot for Pascagoula, Mobile and the intercoastal waterway between those two ports. During his ten years as a Pascagoula port pilot Mr. Foster had piloted approximately twelve hundred vessels in and out of the port on an average of approximately 300 per year. He was generally aware of the shipways including Ingalls' Shipway or Launchway No. 1 which was marked by Buoy No. 2. He normally relied solely on this lighted buoy to ascertain his position while navigating vessels into the Pascagoula harbor during nighttime hours. He and other Pascagoula bar pilots testified that the light on Buoy No. 2 had been inoperational on several occasions prior to June 5, 1969 but that they had never known it to be out of position before that time. He had checked "Stella Maris'" compass on the Horn Island Pass range while passing over the bar and found it to be accurate. On previous occasions Foster had inspected the area around Buoy No. 2 and the end of Shipway No. 1 and had determined that in May 1969, a month before this collision, Buoy No. 2 was located at 15 to 20 feet west of the west end of Way. No. 1 and that there was

35 feet of water up to the Buoy. The River Channel was approximately 38 feet deep at high tide at the place where the collision occurred, and at the time of the collision the tide was high, just beginning to fall, with the current moving in a southeasterly direction. The channel of the River was designated to be 350 feet wide but it is actually 370 feet wide in the area of Shipway No. 1. At 8:45 P.M. on the night of this collision, June 5, 1969, Foster had piloted the Victory Class Vessel, S/S Silver Hawk from Terminal "A" wharf in the Pascagoula, Mississippi harbor to Horn Island Pass down the same channel up which the "Stella Maris" was later traveling at the time of the collision. The "Silver Hawk" was approximately 490 feet long with a beam of 65 to 70 feet and an eight foot draft. Also on May 20, 1969 he traversed this channel while piloting a ship out to the Gulf from Terminal wharf "A" at approximately 4:30 A.M. On neither occasion did he attempt to ascertain the position or condition of Buoy No. 2.

16. At the time of the collision and for a number of years prior thereto the defendant and third party plaintiff, Ingalls, owned and utilized two partially submerged shipways or launchways which extended from the eastbank of the Pascagoula River, Shipway No. 10 and Shipway No. 1, the later of which is the southernmost. These shipways were constructed and later extended pursuant to permits issued by the U.S. Army Corps of Engineers, which required that Ingalls maintain such navigational aids in connection therewith as may be required by the U.S. Coast Guard. In accordance with these permits and instructions from the U.S. Coast Guard, Ingalls was to maintain a lighted marker off the outer submerged or western end of each of the ways, which

was done, marking the outer submerged extremity of No. 1, the southernmost way, with Buoy No. 2 and the outer offshore submerged extremity of No. 10, the northernmost way with Buoy No. 4, both of which were equipped with lights.

17. On March 14, 1956 Ingalls advised the U.S. Army Corps of Engineers that the length of Shipway No. 1 extended 155 feet out into the Pascagoula River and requested and received authorization to extend the Way 90 additional feet (Exs. C-30, 33), but the extension was never added. Also the Coast Guard granted Ingalls' application to relocate buoys Nos. 2 and 4 so that they continued to mark the outer or offshore submerged extremities or Shipways Nos. 1 and 10, respectively (Exs. 10 to Ex. V-1-A). In March, 1957 Ingalls made a second application to the Corps of Engineers for permission to extend Shipway No. 1 150 feet rather than 90 feet, which was also granted (Ex. C-36) but which was never accomplished. A third application was filed and granted in December, 1958 for authorization to increase the approved March 1957 extension an additional 68 feet, (Exs. C-36, 37 and 38). Ingalls therefore had authorization for a total addition of 218 feet to Shipway No. 1's original length of 155 feet making the authorized length 373 feet from Station 00, the point at which it enters the River, to its outer extremity. Ingals neither requested nor received any instructions or directions concerning the relocating of Buoys Nos. 2 and 4 in connection with the 1957 and 1958 extension grants but assumed the continuing applicability of the U.S. Coast Guard instructions given in connection with the 1956 permit to relocate these Buoys to mark the outer or offshore submerged extremity of Shipways Nos. 1 and 10 as reconstructed (Ex. V-1-A,

pp. 5, 16-19). The permits granted by the U.S. Army Corps of Engineers state that the issuance thereof was made pursuant to the River and Harbors Act of 1899, 33 U.S.C. 403, which governs the placing of obstructions in navigable waters.

18. Ingalls was aware of the fact that both the U.S. Coast Guard Light List for the Atlantic and Gulf Coast (Ex. I-3) and U. S. Coast Guard Navigation Chart No. 414 (Ex. I-4) reflected the positioning of Buoys Nos. 2 and 4 and the purpose thereof. Ingals did not request nor receive any instructions or authority from the U.S. Coast Guard to move or relocate Buoys Nos. 2 and 4, but knew that it was its duty to maintain these buoys at stations off the outer submerged western ends of Shipways Nos. 1 and 10 respectively. On and before June 5, 1969 Mariners and Pilots navigating the waters of the Pascagoula River relied on these Buoys to mark the ends of the submerged Shipways (Exs. I-30, p. 84; I-11, pp. 14-15; I-13, p. 15; I-12, p. 11).

19. On the date of the collision and for a long period of time prior thereto, the Ingalls' Maintenance Department, of which Henry Raymond Riley was Manager for over 2 1/2 years at the time of this collision, was responsible for the maintenance of Buoy No. 2, including the lighting thereof (Exs. V-1-A, p. 22; V-1-B, pp. 2, 4, 11, 16, 17, 40). However, Ingalls has no record of maintenance performed on Buoy No. 2 or of any inspection thereof during the 2 1/2 period that Riley was manager of this department dating back to 1967 (Ex. D-1B, pp. 26 and 27; Ex. V-1-A, p. 10). Ingalls' maintenance of Buoy No. 2 has always been limited to replacement of its lights when found not to be working. Riley did state that the

positioning of the buoys, including Buoy No. 2, was the responsibility of the Hull Services Department, whose manager is Rudy Schillereff, but no one was apparently aware of this fact. There was no record of anyone in this department ever having checked the positions of the buoys.

20. On Sunday, June 1, 1969, four days before the collision, Ingalls' maintenance manager, Riley, noticed that the lights on Buoy No. 2 were not burning but did not, between that time and the time of the collision of June 5, 1969, notify anyone, including the Pascagoula Bar Pilots Association or the U. S. Coast Guard, and took no corrective action (Ex. V-1-B). Buoy No. 2 was not lighted on the night of June 5, 1969 immediately before and at the time of the collision. On or about June 7, 1969, Buoy No. 2 was taken ashore by Ingalls' employees and found to be in excellent condition except that the pipe holding the light had been broken off and the light taken, apparently by vandals. Also missing was the power cord which ran underwater from the buoy to Ingalls' onshore facilities where there was an on-off light switch which controlled the light on the buoy (Ex. V-1-B).

21. On June 6, 1969 Buoy No. 2 was not in its proper position, but it was determined by Ingalls and the U.S. Army Corps of Engineers to be 100 to 125 feet east or inshore of the outer or western extremity of Shipway 1. (Ex. V-1-A, pp. 7 and 8; Ex. C-48, C-58 and C-59, Item No. 37; Ex. C-46). Buoy No. 2 was in approximately the same position on June 6, 1969 as it was when observed by Riley on June 1, 1969 (Ex. V-1-B, pp. 16-18).

22. Ingalls' No. 1 Shipway was constructed of one

long slab of reinforced concrete about 50 feet wide with four rails or groundways, each about six feet wide and precast in 30 foot sections fastened to the top of the slab with large bolts as shown in the sketch attached to the report of L. L. Tait, Professional Diver (Ex. C-51-A). The four groundways are listed as north, north center, south center and south. The ways are on a slight angle with the River resulting in the north groundway extending westwardly about 12-15 feet farther than the south groundway.

23. The submerged object with which the "Stella Maris" collided on June 5, 1969 was the northwest corner of Ingalls' No. 1 Shipway, that is, the north and north center groundways thereof. The reasons for this finding of fact are: (a) The "Stella Maris" was approximately 125 feet to the west of Buoy No. 2 at the time of the collision and Buoy No. 2 which was supposed to be marking the outer or westernmost end of Shipway No. 1 was approximately 125 feet out of position to the east; (b) the nature of the vessel's damage and the area of that damage, that is, just off the west end of the way the depth of the water is 34 feet (Ex. 46; Ex. I-1), and the top of the way at its outward end is only 18 feet below the water surface (Exs. C-46; C-58 and C-59, Item No. 18). The vessel was drawing 24 feet of water (Ex. I-30, p. 56) and the rip or tear in its hull is at approximately the five foot draft mark or 18 to 19 feet below its water line. Considering the high tide prevailing at the time, the location of the hull tear corresponds with considerable exactness to the depth of the damaged area of the way (Alba Testimony; Exs. C-50; C-51-A); (c) the damage suffered by Ingalls' Shipway No. 1, particularly when considered in the light of the angle at its western

end, corresponds to a force moving on a northerly course: the damage to the way was of recent origin and the angle irons on the north and north center groundways were bent upstream in a northerly direction indicating that a force moving in that direction had caused the damage (Ex. C-51-A). There was no damage to the south and south center groundways, and the greater damage was on the extreme north groundway (an area of 4 by 6 feet), as compared to that suffered by the north center groundway (an area of 12 inches by 18 inches), (Ex. C-51-A); (d) the absence of any other discovered or known obstruction in this area of the Pascagoula River and the fact that Way No. 1 was undamaged as recently as May 24, 1969 when it was surveyed preparatory to the launch of a U. S. Naval vessel (Exs. V-1-C; C-58 and C-59, Item No. 41). The cradles and launching equipment from the launch of that vessel were of insufficient size and strength to have caused the damage of the severity suffered by the "Stella Maris", and in any event, they had been retrieved in an undamaged condition and moved upriver (Schillereff Deposition); (e) Four rivet heads were found on the groundways by the diver, L. L. Tait, two being embedded in the concrete of the north groundway and two lying thereon. These rivets had antifouling paint on them and the hull of the "Stella Maris" contained the same type rivets (Ex. C-51-A). This indicates a great force of considerable magnitude, such as a moving ship, would have had to strike this way, and examination of the rivet heads (Ex. C-51-B) shows the remaining rivet shafts slanted from their normal right angle to the heads indicating they were subjected to a considerable force; (f) the presence of a piece of concrete found or wedged in the torn area of the "Stella Maris" hull (Nelson Testimony; Ex. V-4). Concrete off the north center groundway

of the No. 1 Shipway was found to have been broken, with some pieces lying on the river bottom (Alba Testimony; Ex. C-51-A). The comparison between the concrete found in, and taken from, the vessel's hull, and the concrete retrieved from the way (Ex. V-10), reveals that both bear marks from the same or similar reinforcing rods; (g) in addition, there is no evidence that anything else collided with or damaged Ingalls' Shipway No. 1 at any other time.

24. As discussed above, Ingalls had received authority from the U. S. Corps of Engineers to extend its No. 1 Shipway a total of 373 feet from Station 00, the point at which it enters the river; nevertheless, the U. S. Corps of Engineers Survey made on June 6, 1969, the day after this collision, revealed that the north side groundway of the No. 1 Way from the waterline to the northwest corner which was struck by the "Stella Maris" actually measured 420 feet. Thus, it exceeded its authorized length by 47 feet (Ex. C-46).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter which is within the Admiralty and Maritime Jurisdiction of the United States and of this Court. 18 U.S.C. § 1331(1).

2. Owner plaintiffs had title to the cargo carried by the "Stella Maris" on the voyage in question and are entitled to bring this action. Although Federal Navigation Regulations do not expressly provide a cause of action for an injured party, as does teh FELA, nevertheless such liability is clearly implied. *Morania Barge No. 140, Inc.*

v. M. J. Tracy, Inc. (2nd Cir., 1962), 312 F.2d 78, 80; *Lauritzen v. Chesapeake Bridge Tunnel District,* (D.C. Va., 1966) 259 F.Supp. 633, affd. in part and revd. in part, (4th Cir., 1968) 404 F.2d 1001.

3. The insurer plaintiffs were subrogated to the owner's rights upon payment for damages to the owners' cargo aboard the "Stella Maris" pursuant to their policies of insurance. *United States v. South Carolina State Highway Dept.* (4th Cir., 1948) 171 F.2d 893; *Phoenix Insurance Co. v. Erie & W. Transp. Co.,* 117 U.S. 312, 6 S.Ct. 750; 29 L.Ed. 873 (1886). In addition, plaintiffs other than the underwriters have their right of recovery surviving subrogation as to any contribution they may be obligated to make in the General Average declared by the vessel.

4. Defendant and third party plaintiff, Ingalls, in extending its Shipway No. 1 a total distance of 420 feet in a westerly direction into the Pascagoula River from the East shore thereof at Station 00, exceeded the length of the Way beyond that authorized by the U. S. Army Corps of Engineers Permit (Ex. C-36), and thus violated the River and Harbors Act (33 U.S.C. 401, 403). This violation gives rise to the presumption of negligence per se and results in the creation of an unlawful obstruction to navigable waters. *Le Crevatte C., Inc.* (S.D. Ala., 1968) 1969 A.M.C. 198, 201; *Atlantic Pipeline Co. v. Dredge Philadelphia* (D.C. Pa., 1965) 247 F. Supp. 857, affd. (3rd Cir. 1966), 366 F. 2d 780.

5. The defendant and third party plaintiff, Ingalls, was legally responsible for maintaining Buoy No. 2 to adequately mark its Shipway No. 1 off the outer or

western edge thereof and to properly maintain this navigational aid to determine that its lights were functioning and that it was in proper position. It negligently failed to discharge this duty in violation of both the Permit issued by the U.S. Corps of Engineers and the U. S. Coast Guard Regulations. 33 C.F.R. 66.01-15. Ingalls had actual notice through its maintenance department manager, Riley, that the light on the buoy was not burning on June 1, 1969, and knew, or through the exercise of reasonable care, should and would have known through proper inspection and maintenance, that this buoy was out of position on that date as it was on June 5, 1969 at the time of the collision. Since Riley testified that Buoy No. 2 was in approximately the same position on June 6, 1969, the day following the collision, that it was on June 1, 1969, four days before the collision, and and in view of the fact that the Buoy was approximately 125 feet east or toward the land from the end of Shipway No. 1 and the "Stella Maris" was approximately 125 feet west or outside said Buoy at the time of the collision, the collision would not have occurred had the unlighted Buoy on June 5, 1969 at the time of the collision been in its proper and designated position. *Russell, Poling & Co. v. United States*, (2nd Cir. 1950), 252 F. 2d 167; *C. & O. Raliway Co. v. U.S.*, (E.D. Mich. 1962) 1964 A.M.C. 2651.

6. The above deviation by Ingalls constitute statutory violations. *Fort Fetterman v. South Carolina State Hwy. Dept.*, (4th Cir. 1958) 261 F. 2d 563; *J. Lauritzen v. Chesapeake Bay Bridge and Tunnel District, et al*, (D.C. Va., 1966) 259 F. Supp. 633, affd. in part and revd. in part (4th Cir. 1968), 404 F. 2d 1001; *Atlantic Pipeline Co. v. Dredge Philadelphia*, (D.C. Pa., 1965), 247 F.

Supp. 857, affd. (3rd Cir. 1966) 366 F. 2d 780. These statutory violations constitute negligence per se clearly calling for the application of the rule stated in *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873), to the effect that the burden rests upon the party guilty of a statutory fault to show, not only that probably his fault did not contribute to the disaster, but that it could not possibly have done so. *The Pennsylvania* rule, undoubtedly creates a strong presumption that the above substantial and material statutory faults, singularly or together, were the proximate contributiing causes of the collision and places upon the offender the burden of establishing that such violation could not with reasonable possibility have contributed to the collision. *The Fort Fetterman v. South Carolina State Hwy. Dept., supra*, at 563, 567, 569. Applying these principles to the facts at hand this Court concludes that Ingalls has not met this required burden, and that its above statutory violations, and each of them, were proximate contributing causes of the collision and the resulting damage to the plaintiffs' cargo and the vessel "Stella Maris".

7. The Court further finds from a preponderance of the evidence that: the defendant Ingalls, having established Buoy No. 2 as an aid to navigation marking the submerged Shipways, as acknoweldged by it and as required by the United States Coast Guard and U.S. Corps of Engineers, had the duty to use reasonable care concerning the maintenance of its position, *Indian Towing Co., Inc. v. United States*, 350 U.S. 961; 76 S.Ct. 64; 100 L.Ed. 765, (1955); and that it had actual notice through its maintenance manager Riley that the buoy was out of its proper position to such an extent as to endanger navigation In view of the above findings of

facts, Ingalls is held to have constructive knowledge of the movement of the buoy which could and would have been discovered through a reasonable and proper inspection or through the reporting thereof, in view of the fact that the light thereon was observed to be out on June 1, 1969. It failed to discharge these duties and its failure constituted negligence which proximately caused the collision in question, even in the absence of the applicability of the *Pennsylvania* rule to the facts of this case. See *M/S Bella Dan*, 1967 A.M.C. 2295, 2304 (E.D. Va., 1967), affd. in part and revd. in part, *J. Lauritzen vs. Chesapeake Bay Bridge and Tunnel District*, (C.A. 4, 1968), 404 F. 2d 1001; *Indian Townig Co. v. United States, supra; Casement & Co. v. Brown*, 148 U.S. 615; *F.S. Royster Guano Co. v. Outten*, (4th Cir., 1920), 266 Fed. 484; *La Crevatte V., supra.*

8. The pilot Foster was guilty of no negligence which proximately caused or proximately contributed to cause the collision between the "Stella Maris" and Ingalls submerged Shipway No. 1. The duty of the pilot is to exercise that degree of care and skill possessed by the average pilot, and the mere fact that a different course of action might have avoided a collision is not enough in itself to condemn him to legal liability. The pilot's decision to handle the movement as he did was that of a reasonably competent harbor pilot under the circumstances that existed. He exercised the due care and skill required of him and was not required to be infallible. *United Fruit Co. v. Mobile Towing & Wrecking Co.*, (S.D. Ala. 1959) 177 F. Supp. 297. Furthermore, a navigator is not charged with negligence unless he makes a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and

under the circumstances shown. *D.W.H. Baldwin* (2nd Cir. 1921 Fed. 411; *Dolldorf v. Higgerson-Buchanan, Inc.*, (4th Cir. 1968) 402 F. 2d 419. The attention which a navigator might pay to his surroundings is not a legal absolute and will vary with the circumstances and situations. *Dolldorf v. Higgerson-Buchanan, Inc., supra.* Aids to navigation placed along a channel for the purpose of navigating a vessel therein, including buoys, are the most immediate sources of information available to those navigating in a narrow channel. *Russell, Poling & Co. v. U.S., supra.* Ingalls No. 2 Buoy was the only navigational aid in the Pascagoula River at the place of the collision, and the pilot under the circumstances at night could not through the exercise of reasonable care as a reasonably prudent pilot determine that this buoy was out of position. Therefore, he was entitled to rely upon it being in its proper and designated position, and not offstation. *Trinidad Corporation v. S.S. Sister Katingo,* 1967 A.M.C. 1561, 1567-8 (S.D. N.Y., 1967), partially reported 280 F. Supp. 976. Thus, although the general rule is that it is improper for a pilot to rely solely and exclusively upon a buoy when other sources of information are available, this general rule is not applicable to this case since the Court finds that there were no other sources of information available or other navigational aids upon which the pilot could rely to readily and accurately estimate the ship's position in the channel. *Russell, Poling & Co. v. U.S., supra* Because of the law silhouette of the bank on each side, it was impossible to utilize the east and west banks of the river for navigational purposes. However, the pilot did also rely upon a proper compass course and proceeded northward with caution after leaving Beacon No. 46 and after having

checked the ship's compass north of Horn Island and found it to be working properly. See *Doherty v. Thames Towboat Co.*, 1920 A.M.C. 215-216 (1919).

9. The pilot was entitled to assume that the navigable waters west of the outer end of the submerged Shipway No. 1 were free from artificial obstructions. See *Casement v. Brown, supra; M/S Bella Dan, supra.* The misleading, erroneous and improper position of Ingalls Buoy No. 2, which the pilot passed at what was the normal and proper relative position between the ship he was piloting and the buoy, that is, approximately 125 feet to the outside or west thereof where there would normally have been at least 34 feet of water and which would have been more than 125 feet west of the outer end of the submerged Shipway No. 1 had the buoy been in its proper position, leads the Court to conclude that the misleading and erroneous position of this buoy lured the pilot into a dangerous position or trap, and that this was the proximate cause of the collision and of the damages suffered by the cargo plaintiffs and the defendants, vessel and her owner. *Steiner v. La Crevatte V., Inc., supra; Russell, Poling & Co., Inc. v. U.S., supra.*

10. Even assuming negligence on the part of the pilot in proceeding in a northerly direction toward Bouy No. 2 when he could not see the light on that buoy, nevertheless the fact that he did see the buoy and properly passed approximately 125 feet west of it was not a proximate contributing cause of the collision and the resulting damages, because if the buoy had been lighted he would have followed the same course that he did in passing it.

11. The Court further concludes that the utilization of all other navigational aids including radar, fathometer, etc. on board the "Stella Maris" would not have avoided the collision in question. Under the existing circumstances neither the pilot, the captain nor the crew was obligated to use these aids, but in any event, if they had done so, it would not have avoided the collision. Therefore, this nonuse was not a proximate contributing cause of this collision.

12. Furthermore, the Court finds that the pilot had ordered a true north course from Beacon No. 46 which should have brought him to the west side of the submerged Shipway No. 1, but through the natural "Crabbing" or "yawing" of the ship to the starboard because the tide was falling to the southeast, the "Stella Maris" proceeded along her ill fated course. In any event, the pilot was navigating in accordance with and relying upon Buoy No. 2 which he had a right to do, and he would have followed his same course or one even more to the east and closer to the buoy if it had been lit and properly operating. Therefore, the Court finds that this "crabbing" or "yawing" of the ship was not due to the negligence of the pilot or the captain, but even if it was, that this negligence was not a proximate contributing cause of the collision.

13. Neither the vessel "Stella Maris", its owner nor crew was guilty of any fault or negligence which proximately contributed to cause this collision. The "Stella Maris" had a lookout properly stationed, and he was not negligent in failing to see and detect an underwater obstruction such as Ingalls' Shipway No. 1. See *M/S Bella Dan*, 1967 A.M.C. 2295, 2304 (1967). The captain

of the "Stella Maris" exercised due care in permitting the pilot to navigate the ship up the Pascagoula River under the circumstances then and there existing and in placing reliance upon the proper stationing of the buoy, which the "Stella Maris" passed at an apparently safe distance. All of the above conclusions of law arrived at by the Court in absolving the pilot of any negligence which proximately contributed to the collision equally apply to the captain and crew members of the "Stella Maris". The improper positioning of Buoy No. 2 and the complete absence of any inspection program or actual inspections over a period of several years prior to this collision to ascertain the proper positioning of the buoy was one of the proximate causes of this collision in view of the fact that the Court has concluded that the improper positioning of Buoy No. 2 and the unauthorized extension of Shipway No. 1 in excess of its authorized length or extension out into the Pascagoula River were the sole proximate causes of the collision.

14. The Court further finds that the above collision was the sole proximate cause of the damage to both the ship and the cargo. It is well established that the Courts will not second-guess the decisions made by masters of imperiled vessels even if they are subsequently proved wrong. *Federal Insurance Co. v. Royalton*, (6th Cir., 1964) 328 F. 2d 515; *Esso Standard Oil, S.A., v. S.S. Gasbras Sul*, (2nd Cir., 1968) 387 F. 2d 583; *Kelly Island L & T Co. v. City of Cleveland*, 47 F. Supp. 533 (E.D. Ohio, 1942). In the *Gasbras Sul* case the Second Circuit held that the master of a vessel caught in an emergency where he is forced to choose between risky alternatives is entitled to a wide range of discretion in deciding what to do, provided it is a reasonable exercise

of current standards of nautical knowledge and skill under the circumstances. It does not become negligence because the decision hemakes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong. The Court finds that the decision of the captain to navigate the vessel to Terminal wharf "A" to attempt to pump her out and her subsequent beaching within the time intervening between the collision, did not constitute negligence, but constituted reasonable and prudent action under the circumstances. Therefore, there was no intervening negligence subsequent to the collision on the part of the captain or anyone else that contributed to damage to the vessel or the cargo therein. *Algonquin*, (2nd Cir. 1934) 70 F. 2d 335; *Walter A. Luckenbach-Lyman Stewart* (9th Cir., 1926) 14 F. 2d 100.

15. In conclusion, this Court finds that neither the defendant pilot, Foster, nor the vessel "Stella Maris", its owner, crew or agent was guilty of any negligence which proximately contributed to cause the collision in question, but that the collision which occurred when the "Stella Maris" struck the northbound way of the defendant and third party plaintiff, Ingalls' submerged Shipway No. 1 was solely and proximately caused by the aforesaid negligence of Ingalls. Thus the defendant Ingalls is liable to and must reimburse the appropriate plaintiffs for all losses sustained by them as a result of the collision in question and is liable to and must reimburse them for any contributions they may be called upon to make in General Average and/or salvage, together with all costs of this proceeding. *Aktieselskabet Cuzco v. Sucaseco, et al*, 294 U.S. 394 (1935). Ingalls is also liable to "Stella Maris" and her owners on their Counterclaim, and must reimburse the vessel and her owners for all

their probable damages and losses directly resulting from this collision, together with all costs of this proceeding.

Ingalls is not entitled to recover under its third party Claim which shall be dismissed at its costs.

A Judgment or Decree shall be presented to this Court in accordance with the foregoing Findings and Conclusions within the time prescribed by the Rules.

UNITED STATES DISTRICT JUDGE

Biloxi, Mississippi
March 20th, 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29890

AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL,

Plaintiffs-Appellees-Cross Appellants,

versus

JACOB A. FOSTER, ET AL.,

Defendants-Appellees,

versus

THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC.,

Third Party Plaintiff-Appellant-Cross Appellee.

versus

VERA CRUZ CIA. NAVIERA, S.A., ETC., ET AL,

Third Party Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

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(May 10, 1971)

Before RIVES, THORNBERRY and COLEMAN, Circuit Judges.

PER CURIAM: The long and short of this appeal is that Ingalls, the third-party plaintiff appellant cross-appellee, is dissatisfied with the findings of fact made by the court below in this maritime collision suit in which Ingalls was held liable for the loss of cargo. Notwithstanding Ingalls' fifteen points of error, all of which attack in one form or another the fact findings and credibility decisions of the court below, we have reached the conclusion that the trial court was not clearly erroneous in any of its findings of fact in this case. Our own review of the briefs and voluminous record in this appeal establishes that the trial court gave lengthy and careful consideration to all the evidence in this case, and that there is ample evidence to support each and every one of its findings. We therefore affirm the judgment appealed from by Ingalls in all respects.

There is a cross-appeal by the plaintiff Cargo Interests in this suit, in which it is contended that the trial court erred in disallowing prejudgment interest from the date of the casuality. The district judge gave no reason for his decision to disallow prejudgment interest, and we can see no reason for his decision. The general rule in admiralty is that those injured by tortious collision are entitled to interest from the date of collision. *Managua Nav. Co. Aktieselskabet Borgestad*, 5th Cir. 1925, 7 F.2d 990, 993. Further, discretion to deny interest must be based upon the existence of peculiar circumstances. *Sinclair Refining Co. v. The S/S Green Island*, 5th Cir. 1970, 426 F.2d 260. In this case, none of the peculiar circumstances usually considered to justify disallowance of prejudgment interest in admiralty collision suit is present. Neither party has been guilty of any delay in bringing this suit to trial. Ingalls has never seriously

disputed that it was guilty of negligence in failing to keep its buoy lighted and in place; rather Ingalls sought mainly in the court below and on this appeal to establish that other parties were either more at fault than it, or at least mutually at fault with it. And finally, the claims of the Cargo Interests are readily ascertainable. *Sinclair Ref. Co., supra*, at 262. Thus we see no reason that would justify making an exception to the general rule that interest from the date of collision should be allowed. *Managua Nav. Co., supra*, at 993. Accordingly, the final judgment of the court below is modified to include interest from the date of collision.

Judgment MODIFIED as to interest, AFFIRMED in other respects.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29890

AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL,

Plaintiffs-Appellees-
Cross Appellants,

versus

JACOB A. FOSTER, ET AL.,

Defendants-Appellees,

versus

THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC.,

Third Party Plaintiff-
Appellant-Cross Appellee.

versus

VERA CRUZ CIA. NAVIERA, S.A., ETC., ET AL,

Third Party Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

(June 3, 1971)

ON PETITION FOR REHEARING

Before RIVES, THORNBERRY and COLEMAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29890

AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL,

Plaintiffs-Appellees-
Cross Appellants,

versus

JACOB A. FOSTER, ET AL.,

Defendants-Appellees,

versus

THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC.,

Third Party Plaintiff-
Appellant-Cross Appellee.

versus

VERA CRUZ CIA. NAVIERA, S.A., ETC., ET AL,

Third Party Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

Before RIVES, THORNBERRY and COLEMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby modified as to interest; and affirmed in other respects in accordance with the opinion of this Court.

It is further ordered that third party plaintiff-appellant-cross appellee pay to plaintiffs-appellees-cross appellants, defendants-appellees, and third party defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate: May 10, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29890

AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL,

Plaintiffs-Appellees-
Cross Appellants,

versus

JACOB A. FOSTER, ET AL.,

Defendants-Appellees,

versus

THE INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC.,

Third Party Plaintiff-
Appellant-Cross Appellee.

versus

VERA CRUZ CIA. NAVIERA, S.A., ETC., ET AL,

Third Party Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

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ORDER:

ON CONSIDERATION OF THE APPLICATION of the *third party plaintiff-appellant-cross appellee* in the above numbered and entitled cause for a stay of the

mandate of this Court therein, to enable *third party plaintiff-appellant-cross appellee* to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is hereby stayed for a period of 30 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 30 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denied the writ, or upon the expiration of 30 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

/s/ HOMER THORNBERRY

United States Circuit Judge

Dated: June 24, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-108

THE INGALLS SHIPUBILDING DIVISION
OF LITTON SYSTEMS, INC.,

Petitioner,

versus

AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL.,

Respondent,

and

JACOB A. FOSTER, ET AL.,

Respondent,

VERA CRUZ CIA. NAVIERA, S.A., ETC., ET AL.,

Respondent,

BRIEF FOR RESPONDENTS AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL. IN OPPOSITION

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The Umbria, 166 U.S. 404 (1896) 8, 9
The Sovereign of the Seas, 139 F. 812 (E.D. Va., 1905) 9
The Styria v. Morgan, 186 U.S. 1 (1902) 7
The William Chisholm, 153 F. 704 (6th Cir., 1907) 9

United States v. Benedict, 261 U.S. 294 (1923) 8
United States v. D'Argento, 227 F. Supp. 596 (N.D. Ill., 1964) 8
United States v. Knohl, 379 F. 2d 427 (2nd Cir. 1967) 7
United States v. McCarthy, 292 F. Supp. 937 (S.D. N.Y., 1968) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-108

THE INGALLS SHIPUBILDING DIVISION OF LITTON SYSTEMS, INC.,

Petitioner,

versus

AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL.,

Respondent,

and

JACOB A. FOSTER, ET AL.,

Respondent,

VERA CRUZ CIA. NAVIERA, S.A., ETC., ET AL.,

Respondent,

BRIEF FOR RESPONDENTS AMERICAN ZINC CO., WILBUR ELLIS CO., INC., ET AL. IN OPPOSITION

Opinions Below

The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Mississippi, Southern Division are reported at 313 F. Supp. 671 and are also reproduced in the Appendix to the Petition for a Writ of Certiorari as are the judgments of that

Court. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 441 F. 2d 1100 and is also reproduced in the Appendix.

Jurisdiction

Respondents, American Zinc Co., Wilbur Ellis Co., Inc. (hereinafter referred to as "Cargo Interests") do not question the jurisdiction as set forth in the Petition.

Questions Presented

Questions 1 through 4 as set forth in the Petition do not assert questions upon which the basic award granted Cargo Interests by the courts below could be reversed. The Statement of the Case and Petitioner's argument as to the remaining question having to do with interest in fact indicates the question is as follows: Did the court below in the matter of the cross-appeal properly reverse the trial court and allow prejudgment interest to Cargo Interests?

Statutes Involved

The River and Harbours Act—33 C.F.R. 401, 403.

Regulations Involved

Cargo Interests do not dispute the involvement of the regulation set forth in the Petition but urge the addition of the following as an involved regulation: U. S. Coast Guard Regulations—33 C.F.R. 66.01-5.

Statement of the Case

Petitioner's statement of the case is substantially correct to the extent that it presents same. While Petitioner's statement does acknowledge that its buoy in question was not

lighted or positioned as required by the U. S. Coast Guard, it is silent as to Petitioner's Shipway No. 1 having exceeded its length as authorized by the U. S. Army Corps of Engineers.[1] For obvious reasons the Petitioner's statement also fails to mention that as to each of these three failings, the trial court found Petitioner to have violated a federal statute and, thereby, guilty of negligence per se.[2] Nor does

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[1] (Finding of Fact No. 24) As discussed above, Ingalls had received authority from the U.S. Corps of Engineers to extend its No. 1 Shipway a total of 373 feet from Station 00, the point at which it enters the river; nevertheless, the U.S. Corps of Engineers Survey made on June 6, 1969, the day after this collision, revealed that the north side groundway of the No. 1 Way from the waterline to the northwest corner which was struck by the "Stella Maris" actually measured 420 feet. Thus, it exceeded its authorized length by 47 feet (Ex. C-46).

[2] (Conclusion of Law No. 4) Defendant and third party plaintiff, Ingalls, in extending its Shipway No. 1 a total distance of 420 feet in a westerly direction into the Pascagoula River from the East shore thereof at Station 00, exceeded the length of the Way beyond that authorized by the U.S. Army Corps of Engineers Permit (Ex. C-36), and thus violated the River and Harbors Act (33 U.S.C. 401, 403). This violation gives rise to the presumption of negligence per se and results in the creation of an unlawful obstruction to navigable waters. *La Crevatte* v., *Inc.* (S.D. Ala., 1968) 1969 A.M.C. 198, 201; *Atlantic Pipeline Co.* v. *Dredge Philadelphia* (D.C. Pa., 1965) 247 F. Supp. 857, affd. (3rd Cir. 1966), 366 F. 2d 780.

(Conclusion of Law No. 5) The defendant and third party plaintiff, Ingalls, was legally responsible for maintaining Buoy No. 2 to adequately mark its Shipway No. 1 off the outer or western edge thereof and to properly maintain this navigational aid to determine that its lights were functioning and that it was in proper position. It negligently failed to discharge this duty in violation of both the Permit issued by the U.S. Corps of Engineers and the U.S. Coast Guard Regulations. 33 C.F.R. 66.01-15. Ingalls had actual notice through its maintenance department manager, Riley, that the light on the buoy was not burning on June 1, 1969, and knew, or through the exercise of reasonable care, should and would have known through proper inspection and maintenance, that this buoy was out of position on that date as it was on June 5, 1969 at the

it mention that the Petitioner had actual notice of the buoy light being extinguished[3] and that it knew or should have

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time of the collision. Since Riley testified that Buoy No. 2 was in approximately the same position on June 6, 1969, the day following the collision, that it was on June 1, 1969, four days before the collision, and in view of the fact that the Buoy was approximately 125 feet east or toward the land from the end of Shipway No. 1 and the "Stella Maris" was approximately 125 feet west or outside said Buoy at the time of the collision, the collision would not have occurred had the unlighted Buoy on June 5, 1969 at the time of the collision been in its proper and designated position. *Russell, Poling & Co.* v. *United States,* (2nd Cir. 1958), 252 F. 2d 167; *C. & O. Railway Co.* v. *U.S.,* (E.D. Mich. 1962) 1964 A.M.C. 2651.

(Conclusion of Law No. 6) The above deviation by Ingalls constitute statutory violations. *Fort Fetterman* v. *South Carolina State Hwy. Dept.,* (4th Cir. 1958) 261 F. 2d 563; *J. Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District, et al,* (D.C. Va., 1966) 259 F. Supp. 633, affd. in part and revd. in part (4th Cir. 1968), 404 F. 2d 1001; *Atlantic Pipeline Co.* v. *Dredge Philadelphia,* (D.C. *Pa.,* 1965), 247 F. Supp. 857, affd. (3rd Cir. 1966) 366 F. 2d 780. These statutory violations constitute negligence per se clearly calling for the application of the rule stated in *The Pennsylvania,* 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873), to the effect that the burden rests upon the party guilty of a statutory fault to show, not only that probably his fault did not contribute to the disaster, but that it could not possibly have done so. *The Pennsylvania* rule, undoubtedly creates a strong presumption that the above substantial and material statutory faults, singularly or together, were the proximate contributing causes of the collision and places upon the offender the burden of establishing that such violation could not with reasonable possibility have contributed to the collision. *The Fort Fetterman* v. *South Carolina State Hwy. Dept., supra,* at 563, 567, 569. Applying these principles to the facts at hand this Court concludes that Ingalls has not met this required burden, and that its above statutory violations, and each of them, were proximate contributing causes of the collision and the resulting damage to the plaintiffs' cargo and the vessel "Stella Maris".

[3] (Finding of Fact No. 20) On Sunday, June 1, 1969, four days before the collision, Ingalls' maintenance manager, Riley, noticed that the lights on Buoy No. 2 were not burning but did not, between that time and the time of the collision of June 5, 1969, notify anyone, including the Pascagoula Bar Pilots Association or the U.S. Coast Guard, and took no corrective action (Ex. V-1-B). Buoy

known of the buoy itself being out of position on June 1, 1969 or four days prior to the collision.[4] It is also significant to the Petition hereunder discussion that the trial court found that "the collision would not have occurred had the unlighted Buoy on June 5, 1969 at the time of the collision been in its proper and designated position."[5] This mis-positioning was confirmed as early as July 6, 1969, the day following the collision, when both Petitioner and the U. S. Army Corps of Engineers found the buoy "to be 100 to 125 feet east or inshore of the outer or western extremity of Shipway No. 1."[6] Even in the absence of statutory fault,

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No. 2 was not lighted on the night of June 5, 1969 immediately before and at the time of the collision. On or about June 7, 1969, Buoy No. 2 was taken ashore by Ingalls' employees and found to be in excellent condition except that the pipe holding the light had been broken off and the light taken, apparently by vandals. Also missing was the power cord which ran underwater from the buoy to Ingalls' onshore facilities where there was an on-off light switch which controlled the light on the buoy (Ex. V-1-B).

[4] (Conclusion of Law No. 5) Note 2, supra.

[5] (Conclusion of Law No. 5) Note 2, supra.

[6] (Finding of Fact No. 21) On Jun 6, 1969, Buoy No. 2 was not in its proper position, but it was determined by Ingalls and the U.S. Army Corps of Engineers to be 100 to 125 feet east or inshore of the outer or western extremity of Shipway 1 (Ex. V-1-A, pp. 7 and 8; Ex. C-48, C-58 and C-59, Item No. 37; Ex. C-46). Buoy No. 2 was in approximately the same position on June 6, 1969 as it was when observed by Riley on June 1, 1969 (Ex. V-1-B, pp. 16-18).

Petitioner's gross disregard of maintenance of the buoy as to functioning and positioning[7] constitutes negligence upon which Petitioner's liability could be based.[8]

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[7] (Finding of Fact No. 19) On the date of the collision and for a long period of time prior thereto, the Ingalls' Maintenance Department, of which Henry Raymond Riley was Manager for over 2½ years at the time of this collision, was responsible for the maintenance of Buoy No. 2, including the lighting thereof (Exs. V-1-A, p. 22; V-1-B, pp. 2, 4, 11, 16, 17, 40). However, Ingalls has no record of maintenance performed on Buoy No. 2 or of any inspection thereof during the 2½ year period that Riley was manager of this department dating back to 1967 (Ex. D-1B, pp. 26 and 27; Ex. V-1-A, p. 10). Ingalls' maintenance of Buoy No. 2 has always been limited to replacement of its lights when found not to be working. Riley did state that the positioning of the buoys, including Buoy No. 2, was the responsibility of the Hull Services Department, whose manager is Rudy Schillereff, but no one was apparently aware of this fact. There was no record of anyone in this department ever having checked the positions of the buoys.

(Conclusion of Law No. 13) Neither the vessel "Stella Maris", its owner nor crew was guilty of any fault or negligence which proximately contributed to cause this collision. The "Stella Maris" had a lookout properly stationed, and he was not negligent in failing to see and detect an underwater obstruction such as Ingalls' Shipway No. 1. See *M/S Bella Dan*, 1967 A.M.C. 2295, 2304 (1967). The captain of the "Stella Maris" exercised due care in permitting the pilot to navigate the ship up the Pascagoula River under the circumstances then and there existing and in placing reliance upon the proper stationing of the buoy, which the "Stella Maris" passed at an apparently safe distance. All of the above conclusions of law arrived at by the Court in absolving the pilot of any negligence which proximately contributed to the collision equally apply to the captain and crew members of the "Stella Maris". The improper positioning of Buoy No. 2 and the complete absence of any inspection program or actual inspections over a period of several years prior to this collision to ascertain the proper positioning of the buoy was one of the proximate causes of this collision in view of the fact that the Court has concluded that the improper positioning of Buoy No. 2 and the unauthorized extension of Shipway No. 1 in excess of its authorized length or extension out into the Pascagoula River were the sole proximate causes of the collision.

[8] (Conclusion of Law No. 7) The Court further finds from a preponderance of the evidence that: the defendant Ingalls, having established Buoy No. 2 as an aid to navigation marking the submerged Shipways, as acknowledged by it and as required by the

ARGUMENT

The Petition not having raised any question as to the basic award granted to them by the courts below, Cargo Interests will limit their remarks herein to the issue of prejudgment interest. As to this one issue, the Petition seeks review by this Court contending that the trial court properly exercised its discretion as the full dollar loss has not been proven. Accordingly, what constitutes the proper exercise of that discretion must be determined.

The term "discretion" indicates the absence of a firm rule which would guide a court in taking judicial action. *United States* v. *McCarthy*, 292 F. Supp. 937 (S.D.N.Y., 1968); *United States* v. *Knohl*, 379 F. 2d 427 (2nd Cir., 1967); *Lines* v. *Falstaff Brewing Co.*, 233 F. 2d 927 (9th Cir., 1956); *Delno* v. *Market St. Ry. Co.*, 124 F. 2d 965 (9th Cir., 1942). It cannot be construed as permitting arbitrary, inconsiderate or unequitable action. *The Styria* v. *Morgan*, 186 U.S. 1 (1902); *Birnbaum* v. *Birrell*, 17 F.R.D. 409 (S.D.N.Y. 1955).

United States Coast Guard and U.S. Corps of Engineers, had the duty to use reasonable care concerning the maintenance of its position, *Indian Towing Co., Inc.* v. *United States*, 350 U.S. 961 [61]; 76 S.Ct. 64 [122]; 100 L.Ed. 765 [48], (1955), and that it had actual notice through its maintenance manager Riley that the buoy was out of its proper position to such an extent as to endanger navigation. In view of the above findings of facts, Ingalls is held to have constructive knowledge of the movement of the buoy which could and would have been discovered through a reasonable and proper inspection or through the reporting thereof, in view of the fact that the light thereon was observed to be out on June 1, 1969. It failed to discharge these duties and its failure constituted negligence which proximately caused the collision in question, even in the absence of the applicability of the *Pennsylvania* rule to the facts of this case. See *M/S Bella Dan*, 1967 A.M.C. 2295, 2304 (E.D. Va., 1967), affd. in part and revd. in part, *J. Lauritzen* v. *Chesapeake Bay Bridge and Tunnel District*, (C.A. 4, 1968), 404 F. 2d 1001; *Indian Towing Co.* v. *United States, supra; Casement & Co.* v. *Brown*, 148 U.S. 615; *F. S. Royster Guano Co.* v. *Outten*, (4th Cir., 1920), 266 Fed. 484; *La Crevatte V., supra.*

On the contrary it requires the exercise of sound discretion as directed by reason and conscience with regard to that which is right and equitable under the circumstances so as to achieve a just result. *Langnes* v. *Green,* 282 U.S. 531 (1931); *United States* v. *D'Argento,* 227 F. Supp. 596 (N.D. Ill., 1964).

In its exercise of this discretion in matters involving the taking of property, this Court has held that in addition to the value thereof, the owner is entitled to compensation as will produce the full equivalent of that value as if it had been paid at the time of the taking and interest at a proper rate is a good measure by which to ascertain that additional amount. *Brooks Scanlan Corporation* v. *United States,* 265 U.S. 106 (1924); *Seaboard Air Line Railroad Co.* v. *United States,* 261 U.S. 299 (1923); *United States* v. *Benedict,* 261 U.S. 294 (1923). It is noteworthy that in these cases the federal government had properly requisitioned property pursuant to §10 of the Lever Act[9] which statute called for just compensation and was silent as to interest. Noting that a party is not normally entitled to interest from the United States unless statutorily provided, this Court held interest to be part of "just compensation". Certainly, an aggrieved party whose property has been destroyed is entitled to equal recourse as to a tort feasor and this Court has so held in admiralty matters. *The Umbria,* 166 U. S. 404 (1896); *The Amiable Nancy,* 16 U. S. 546 (1818). These holdings are consistent with the legal maxim of *restitutio in integrum* which admiralty courts employ as a guide in determining just compensation for an aggrieved party. *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146 (1925); *The Baltimore,* 75 U. S. 377 (1868). Furthermore, the First, Second, Fifth, Sixth and Ninth Circuits

[9] 40 Stat. 276.

and district courts in the Third and Fourth Circuits have held that prejudgment interest is necessary to make just compensation. *The President Madison,* 91 F. 2d 835 (9th Cir., 1937); *In re Hibbard,* 27 F. 2d 686 (2nd Cir., 1928); *Eastern S.S. Co.* v. *Dock Co.,* 256 F. 497 (1st Cir., 1919); *The William Chisholm,* 153 F. 704 (6th Cir., 1907); *The Natchez,* 78 F. 183 (5th Cir., 1896); *The Manhattan,* 10 F. Supp. 45 (E.D. Pa., 1935), aff'd 85 F. 2d 427 (3rd Cir. 1936) cert. den'd sub nom. *U. S. v. Bessemer,* 300 U. S. 654 (1936); *The Sovereign of the Seas,* 139 F. 812 (E.D. Va., 1905).

Under the rule as established by this Court in *The Umbria,* supra followed by the lower court herein, discretion to deny prejudgment interest must be based upon the existence of peculiar circumstances. Such circumstances include a delay in instituting suit, however, the action herein was commenced within a few weeks of the subject casualty. A delay in prosecuting the suit will also be considered but this is not true of the case at hand as the trial was held and a judgment was entered within ten months of the collision. Of course, Cargo Interests cannot be charged with delay in prosecuting the appeal as they were only cross-appellants in the court below and are respondents in this Court. There being no peculiar circumstances in the case at hand Cargo Interests cannot be denied prejudgment interest. *Sinclair Refining Co.* v. *S.S. Green Island,* 426 F. 2d 260 (5th Cir., 1970). Indeed, the equities involved as will be herein recited demand the granting of such interest.

The most careful reading of the record in the trial court, confirms that the Petitioner has failed to offer a scintilla of evidence to refute its negligence as to the subject buoy being unlighted and/or out of position. Petitioner's failure

in the above respect is quite understandable as it had knowledge of the buoy lights being out and it being mispositioned in advance of the collision. Furthermore, these facts were confirmed by its own personnel and the U. S. Army Corps of Engineers on the day following the collision. The absence of any such proof and the overwhelming proof to the contrary rendered futile any attempt on the part of the Petitioner to disprove its negligence. It is in this character, futility, that Petitioner's efforts as to the Cargo Interests have been cast since the institution of suit. Nonetheless, Petitioner has persisted in refusing to acknowledge its obvious liability to Cargo Interests. On the trial, Petitioner offered no proof to establish its having been free of fault but limited its proof to that based upon which it contended that Respondents, Jacob A. Foster (hereinafter referred to as "Foster") and Vera Cruz Cia. Naviera, S.A. (hereinafter referred to as "Vera Cruz") were also at fault. In the court below, Petitioner following the same tactic submitted some fifteen Specifications of Error, all but two of which deal solely with asserted errors of the trial court in exonerating Foster and Vera Cruz. One of the remaining two specifications (No. 1) was not a specification at all but merely a broad charge that the judgment of the trial court "was contrary to the law and the evidence of the case." The last (No. 8) challenges the trial court's holding as to the unauthorized length of Petitioner's submerged Shipway No. 1. An obvious absence from Petitioner's brief in the court below is any reference whatsoever to the trial court's two other holdings of statutory fault as to the buoy being unlighted and out of position. It is, therefore, abundantly clear that having determined it had an opportunity to share fault with one or both of the other defendants, Petitioner considered it no more expensive to litigate with all parties. The Fifth Circuit commented on the above recited cir-

cumstances and was obviously influenced by them in reversing the trial court and allowing prejudgment interest.[10]

Notwithstanding the above, Petitioner offers the unsupported assertion that the trial court ". . . had ample evidence and reasons for disallowing prejudgment interest. . ." Petitioner's Brief for Certiorari at p. 17. However, this is again contrary to the views of the court below.[11]

These facts clearly establish that Petitioner at no time offered a defense to the claims of Cargo Interests and the general allegation that the "damages were not so readily ascertainable" as found by the court below should avail Petitioner nothing. It was Petitioner's gross negligence as found by both the trial court and the court below that precipitates the need for the fixing of those damages. Furthermore, at the trial, proof was offered as to the invoice value of each shipment on the S.S. Stella Maris, the amount paid by underwriters on shipments or portions thereof lost and the amount of extraordinary expenses incurred by Cargo Interests as a result of the collision. This provided Petitioner with a close estimate of the loss. In addition all but two of the subject shipments consisted of fishmeal, the landed market value of which commodity is included in a daily publication of United States Department of Interior, Bureau of Commercial Fisheries. One of the remaining shipments consisted of whalemeal which is closely related to fishmeal so that its landed market value is also readily ascertainable. The invoice value of the remaining ship-

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[10] 441 F. 2d 1100 at 1101 "Ingalls has never seriously disputed that it was guilty of negligence in failing to keep its buoy lighted and in place; rather Ingalls sought mainly in the court below and on this appeal to establish that the other parties were either more at fault than it, or at least mutually at fault with it."

[11] 441 F. 2d 1100 at 1101 "In this case, none of the peculiar circumstances usually considered to justify disallowance of prejudgment interest in admiralty collision suits is present."

ment is the same as its landed market value so that it is already known.

It is, therefore, respectfully submitted that in light of the equities and the absence of peculiar circumstances, the granting of prejudgment interest was clearly proper and within the well established law in admiralty collision cases and that the Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated above, Respondents, American Zinc Co., Wilbur Ellis Co., Inc., et al. urge this Court to deny the Writ of Certiorari.

Respectfully submitted,

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I certify that a copy of the foregoing brief in opposition to the Writ of Certiorari has been served on opposing counsel by depositing same in the U. S. Mail, postage prepaid, this 19th day of August, 1971.

Francis V. Elias

FRANCIS V. ELIAS

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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VERA CRUZ CIA. NAVIERA, S.A., ETC.,
Respondent.

BRIEF OF VERA CRUZ CIA. NAVIERA, S.A. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The petition fails to set forth any proper reason why this Court should exercise its discretionary review over the decision of the Court of Appeals. Examination of the very questions presented by petitioner reveals that this case con-

cerns nothing more than the application of uncontroverted principles of maritime law to a particular factual situation. In the words of the Court of Appeals, the long and short of it is simply that petitioner "is dissatisfied with the findings of fact made by the Court below" (441 F.2d at page 1101, appendix to petition [hereinafter "A."], page 54).

The basic determination which petitioner, Ingalls, seeks to review is whether the pilot, respondent Foster, of the motorvessel Stella Maris, owned by respondent Vera Cruz Cia. Naviera, S.A. and carrying the cargo of respondents, American Zinc Co., *et al.*, was exercising proper care in navigation when the vessel collided with Ingalls' underwater shipway in the Pascagoula River. The trial Court, sitting in admiralty without a jury, found that the cause of the casualty was Ingalls' failure to maintain in its proper position the buoy with which the United States Coast Guard required Ingalls to mark the end of its shipway. The trial Court decided that under the circumstances of this case, established by the evidence before it, the Stella Maris' pilot was not negligent in relying upon the position of Ingalls' buoy which, as the Court found, was off station and "lured the pilot into a dangerous position or trap" (A. 48).

Petitioner Ingalls' appeal to the Court of Appeals was concededly founded upon its disagreement with the findings of fact made by the trial Court, and the Court of Appeals held, after full review of the voluminous trial record, that "there is ample evidence to support each and every one of [the trial Court's] findings" (A. 54). Even in this Court, however, petitioner persists in attacking those findings of fact.

Rule 19 of this Court states that a writ of certiorari "will be granted only where there are special and important reasons therefor." There are no such reasons in this case: the decision below is of interest only to the parties, rests

on the particular facts of the case, and raises no issue of law. The Questions Presented raise only questions of fact determined adversely to petitioner by the trial Court, and affirmed *per curiam* on appeal. We submit that the petition should be denied on its face without further inquiry by this Court. However, we briefly set forth below the answers to petitioner's unfounded assertions that the trial Court erred in its findings of fact and in its determination that under well-established, and undisputed, principles of maritime law the navigation of the Stella Maris was proper.

ARGUMENT

First Question Presented: Qualifications of the Stella Maris' pilot.

In support of its claim of lack of knowledge on the part of the Stella Maris' pilot, Ingalls cites to this Court (petition [hereinafter "P."], pages 4-5, 9-10) certain pre-trial deposition testimony which, Ingalls fails to mention, was explained and elaborated upon in the pilot's testimony at the trial (Record [hereinafter "R."], pages 1442-4). Ingalls fails to comment, moreover, on the fact that in the very Finding from which Ingalls quotes (P. 4, 9) an excerpt out of context—"the Respondent pilot, Foster, was only* 'generally aware of the shipways' "—the trial Court also found:

> "On previous occasions Foster had inspected the area around Buoy No. 2 and the end of Shipway No. 1 and had determined that in May 1969, a month before this collision, Buoy No. 2 was located at 15-20 feet west of the west end of Way No. 1 and that there was 35 feet of water up to the Buoy." (A. 35-6).

*The word "only" is Ingalls', not the Court's.

Contrary to what Ingalls claims (P. 9), there was *no* admission by pilot Foster of "lack of knowledge of the shipways and their bearing upon navigation", the Court below did *not* apply a "requirement of only a general awareness by the pilot" concerning the shipways, and the decision below is *not* in conflict with established maritime law that a pilot is obliged to be familiar with hazards to navigation. Ingalls is simply dissatisfied with the trial Court's finding of fact that this experienced Pascagoula bar pilot "exercised the due care and skill required of him" (A. 46).

Second Question Presented: Reliance by the pilot on Ingalls' marker buoy.

Ingalls' attack upon the pilot's reliance on the position of Ingalls' marker buoy is answered by the trial Court's finding, never mentioned in the petition, that:

> "Ingalls No. 2 Buoy was the only navigational aid in the Pascagoula River at the place of the collision, and the pilot under the circumstances at night could not through the exercise of reasonable care as a reasonably prudent pilot determine that this buoy was out of position. Therefore, he was entitled to rely upon it being in its proper and designated position, and not off station. [citation] Thus, although the general rule is that it is improper for a pilot to rely solely and exclusively upon a buoy when other sources of information are available, this general rule is not applicable to this case since the Court finds that there were no other sources of information available or other navigational aids upon which the pilot could rely to readily and accurately estimate the ship's position in the channel." (A. 47)

The factual issue submitted for determination by the trial Court was whether pilot Foster had reason to suspect that Ingalls' buoy was not on station and whether he had

any means other than the buoy by which he could have determined the Stella Maris' position in the channel. On the basis of all the evidence, including extensive factual and expert testimony adduced on both sides of this question, the trial Court found as a fact that there was no reason for the pilot to suspect that the buoy was not on station and, further, that the buoy was the only navigational aid which the pilot could use to determine the location of Ingalls' underwater shipway. These issues of fact were fully briefed and argued on appeal, and the Court of Appeals concluded:

> "Our own review of the briefs and voluminous record in this appeal establishes that the trial court gave lengthy and careful consideration to all the evidence in this case, and that there is ample evidence to support each and every one of its findings." (A. 54)

Third Question Presented: Alleged inconsistent findings of fact.

Ingalls claims (P. 14-15) that the trial Court's findings have the Stella Maris traveling a quarter of a mile in several seconds. What the trial Court actually found, however, is that after looking for it for some minutes, pilot Foster observed Ingalls' marker buoy, in a safe relative position, when the Stella Maris was some 1,500 feet below it (A. 32) and, in the following Finding (A. 33), that the Stella Maris collided with Ingalls' shipway several seconds after the pilot sighted the buoy abeam of the Stella Maris. The trial court did *not* find that the pilot *first* sighted the buoy abeam, as Ingalls would have it. Contrary to Ingalls' assertion (P. 15), there is *no* evidence in the record that the pilot did not see the buoy until it was abeam*; he testified that

*The Stella Maris' master and lookout testified, and the trial Court correctly found, that *they* did not see the buoy until a few seconds before the collision. There was no such testimony as to the pilot.

he picked up the buoy "in plenty of time to have changed my course, there, if it was necessary. * * * I saw it in sufficient time, like I said, if I thought I was out of the channel I had a lot of time there to get back in it." (R. 1271-5)

Ingalls' contentions regarding the alleged impossible speed, based on Ingalls' contrived interpretation of the testimony, were thoroughly briefed and argued to the trial Court, which had an opportunity to judge pilot Foster's credibility, and to the Court of Appeals, which affirmed the findings of the trial Court.

Fourth Question Presented: The current set the Stella Maris down on Ingalls' shipway.

The petition states (P. 15): "Also, the Court below found as a fact that there was no wind or tide to move the vessel from its intended course of 000° true north." Not so: once again, Ingalls' assertion is inaccurate. The trial Court's finding was that "there was no *apparent* tide or wind condition present which affected the navigation of the vessel as she proceeded northward." (A. 31, emphasis added) The trial Court affirmatively found as a fact, on the evidence before it (R. 225, 241, 1447) that at the time of the collision the tide was "just beginning to fall, with the current moving in a southeasterly direction" (A. 36) and therefore determined that the Stella Maris "crabbed" to the east, toward Ingalls' submerged shipway, "because the tide was falling to the southeast" (A. 49).

Ingalls reiterates (P. 7, 16) that respondents' expert witness testified that the falling off to east must have been caused by a compass or helmsman's error. This, too, is an

inaccurate statement: the expert testified (R. 1699) that in order to get into collision on the course she was steering, "It would have to be a set. The ship would have crabbed to the right." In response to a subsequent question which directed him to *assume* no such setting effect from current or wind, the witness replied that in that event there would have to be an error in the steering or compass (R. 1700).

The petition is, therefore, in error in advising this Court that the trial Court found that there was no wind or tide to set the vessel, in advising this Court that there was no evidence that the current was setting to the southeast, and in advising this Court that respondents' expert testified that the cause of the set to the east must have been helm or compass error. These same objections to the trial Court's findings were advanced on the appeal to the Court below, and rejected after careful review of the record.

Fifth Question Presented: Award of interest.

This issue will be dealt with in the brief to be filed by respondents American Zinc Co., *et al.*, owners of the cargo aboard the Stella Maris at the time of the casualty. Suffice it to say here that the question of discretion to deny interest is not one with which this Court should be concerned.

Conclusion: Certiorari should be denied.

It is submitted that there is no merit in this petition for certiorari. No questions of law are involved, there is no conflict among the circuits, and the Courts below in no way departed from the accepted and usual course of ju-

dicial procedure. There is nothing here, no "special" or "important" reason—or, indeed, *any* reason—why this case should take up the time of this Court.

The petition should be denied.

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Respectfully submitted,

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